

**DOCKET**

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Status: GRANTED

Title: United States Environmental Protection Agency,  
Petitioner  
v.  
Natural Resources Defense Council, Inc., et al.

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ebruary 17, 1984

Court: United States Court of Appeals  
for the Third Circuit

ide:  
83-1013

Counsel for petitioner: Solicitor General

Counsel for respondent: Garrett, Theodore L.,  
Dubrowski, Frances, Harrington, James T.

entry	Date	Note	Proceedings and Orders
1	Dec 9 1983		Application for extension of time to file petition and order granting same until February 17, 1984 (Grennan, December 12, 1983).
2	Feb 17 1984	G	Petition for writ of certiorari filed.
4	Mar 7 1984		Order extending time to file response to petition until April 2, 1984.
5	Apr 2 1984		Brief of respondent NRDC, Inc. in opposition filed. VIDE.
5	Apr 2 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
7	Apr 4 1984		DISTRIBUTED. April 20, 1984
8	Apr 13 1984	X	Reply brief of petitioner EPA filed.
11	Apr 23 1984		ADISTRIBUTED. April 27, 1984
12	Apr 30 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
13	Apr 30 1984		Petition GRANTED. The case is consolidated with 83-1013, and a total of one hour is allotted for oral argument. *****
14	May 30 1984	G	Motion of the parties to dispense with printing the joint appendix filed.
15	Jun 11 1984		Motion of the parties to dispense with printing the joint appendix GRANTED.
17	Jun 11 1984		Order extending time to file brief of petitioner on the merits until July 6, 1984.
19	Jul 6 1984		Brief of petitioner EPA filed. VIDE.
19	Jul 6 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
20	Jul 13 1984		Record filed.
22	Jul 27 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
23	Aug 9 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
24	Aug 20 1984		Brief amicus curiae of New York filed. VIDE.
25	Aug 20 1984		Brief of respondent NRDC, Inc. filed. VIDE.
26	Aug 21 1984		CIRCULATED.
27	Aug 20 1984	G	Motion of Southeastern Fisheries Association, Inc. for leave to file a brief as amicus curiae filed.
28	Aug 28 1984		SET FOR ARGUMENT. Tuesday, November 6, 1984. This case is consolidated with No. 83-1013. (3rd case)(1 hour)
29	Oct 1 1984		Motion of Southeastern Fisheries Association, Inc. for leave to file a brief as amicus curiae GRANTED.

o. 83-1373-CFH

entry	Date	Note	Proceedings and Orders
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30	Oct 29 1984	Reply brief of petitioner EPA filed. VIDEO.	
31	Nov 6 1984	ARGUED.	

**PETITION FOR**

**WRIT OF**

**CERTIORARI**



83 - 1373

No.

Office - Supreme Court, U.S.

FILED

FEB 17 1984

ALEXANDER J. STEVENS  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

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#### QUESTION PRESENTED

Whether Section 301(*l*) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(*l*), bars the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to plants having fundamentally different factors from those considered by EPA in establishing the national standards.

## PARTIES

In addition to those named in the caption, the parties are: American Cyanamid Company, Chemical Manufacturers Association, FMC Corporation, and Union Carbide Corporation.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
ET AL.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case.

**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1-A96)<sup>1</sup> is reported at 719 F.2d 624.

**JURISDICTION**

The judgment of the court of appeals was entered on September 20, 1983. On December 12, 1983, Justice Brennan extended the time to petition for a writ of certiorari until February 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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<sup>1</sup> "Pet. App." refers to the appendix to the petition in No. 83-1013, in which intervenors below, the Chemical Manufacturers Association et al., have sought review of the same portion of the judgment below. All the materials we would have included in the appendix to this petition are contained in the appendix to that petition.



## STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are reproduced at Pet. App. A116-A121. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, as reproduced at Pet. App. A122-A127.

## STATEMENT

1. The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, calls for the regulation of two types of industrial facilities—(1) "direct" dischargers, *i.e.*, facilities that discharge waste water directly into navigable waters; and (2) "indirect" dischargers, *i.e.*, facilities that discharge waste water into publicly owned treatment works (POTWs), where their waste water is commingled with domestic and sanitary waste, municipal runoff, and other industrial waste water prior to discharge into navigable waters by the POTWs. Although the pretreatment program at issue here applies only to indirect dischargers, a brief review of the statutory scheme as it applies to both types of dischargers is necessary.

2. The Act requires direct dischargers to be regulated through phased implementation of technology-based requirements. By July 1, 1977, existing direct dischargers were required to meet effluent limitations based on the "best practicable control technology currently available" (BPT). 33 U.S.C. (Supp. V) 1311(b)(1)(A). By July 1, 1984, such dischargers must meet potentially more stringent effluent limitations for toxic pollutants based upon the "best available technology economically achievable" (BAT). 33 U.S.C. (& Supp. V) 1311(b)(2)(A) and (C). The Act specifies the factors that EPA must consider in establishing BPT and BAT requirements. 33 U.S.C. 1314(b)(1)(B) and (2)(B).<sup>1</sup>

<sup>1</sup> "New source" direct dischargers must meet new source performance standards based on the "best available demonstrated technology" (BATD). 33 U.S.C. 1316.

Indirect dischargers are subject to pretreatment standards applicable to pollutants that are not susceptible to treatment by or would interfere with the operation of POTWs. 33 U.S.C. 1317(b). Like the BPT and BAT standards, these standards are established by notice-and-comment rulemaking for categories of dischargers. 33 U.S.C. 1317(b)(3).<sup>2</sup> EPA decided at an early stage to use the technology-based criteria specified by statute for direct dischargers.<sup>4</sup>

3. The development of national technology-based requirements for direct and indirect dischargers has proven to be an enormous and complex undertaking. For each industrial category, the Agency and its contractors typically seek to obtain as much information as possible regarding the relevant factors, including the types of industrial processes involved, water use practices, the nature and amounts of pollutants in raw waste water, and the costs and effectiveness of various waste water treatment technologies. Questionnaires requesting information on these factors, as well as cost and financial data, are typically sent to at least a cross section of affected plants. Representative facilities are then selected for visits and on-site sampling in order to gain more detailed information. Data are collected on

<sup>2</sup> Indirect dischargers that would be considered new sources under 33 U.S.C. 1316 if they were direct dischargers are also subject to new source pretreatment standards. 33 U.S.C. 1317(c).

<sup>4</sup> This procedure was incorporated into a consent decree entered into with respondent Natural Resources Defense Council, Inc. and approved by the district court in 1978. *NRDC v. Truitt*, 8 Env't Rep. Cas. (BNA) 2126 (D.D.C. 1978), modified sub nom. *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified sub nom. *NRDC v. Gorsuch*, Nos. 2153-73, et al. (D.D.C. Oct. 26, 1982), modified sub nom. *NRDC v. Ruckelshaus*, Nos. 2153-73, et al. (D.D.C. Aug. 2, 1983, and Jan. 6, 1984). In the 1977 amendments to the Act, Congress sanctioned the Agency's approach to establishing pretreatment standards. See *EPA v. Costle*, 636 F.2d 1229, 1244 (D.C. Cir. 1980).

the treatment efficiency of technologies already being used, and tests are often conducted to determine the feasibility and effectiveness of other potential technologies. In addition, the Agency's contractors attempt to determine model costs (both capital and annualized) for various treatment technologies and, using available financial data, they assess the potential economic impacts on the industry, including estimated plant closures and the effect on employment and prices. The treatment efficiency of each technology is determined on a national basis through the combined use of statistical analyses and engineering judgments.<sup>5</sup> In most instances, EPA has found that application of one or more of the statutory factors warranted different requirements for separate subcategories within the national category.<sup>6</sup>

4. During the rulemaking process, the Agency attempts, generally with the cooperation of the affected industry, to obtain all pertinent information. Occasion-

<sup>5</sup> The scope of the task of formulating national categorical standards is exemplified by the procedures followed by EPA in developing the BPT-level electroplating pretreatment standards that were unsuccessfully challenged in the proceedings below. EPA initially sent questionnaires to over 500 plants that it had identified as possibly falling within the category. Of these plants, approximately 200 provided at least some of the requested information. On the basis of the responses, EPA conducted on-site visits of 82 plants to take samples of raw and treated waste water over several days, inspect in-place treatment technology, and collect other first-hand information. These visits enabled EPA to determine that approximately 25 of the plants were representative in terms of treatment technology, character of raw waste water, and other factors. The data from these plants were then used to derive achievable effluent limitations, using a combination of statistical methodologies and engineering judgments.

<sup>6</sup> For example, in the BPT electroplating pretreatment rulemaking, the electroplating category was subdivided into seven subcategories. 40 C.F.R. Pt. 413.

ally, however, the Agency may overlook a relevant factor that applies to a few plants and would dictate a change in the requirements applicable to those facilities. In addition, a particular plant may be so different from all the other plants considered by the Agency that the factors generally deemed relevant to the treatment capabilities of the other plants are inapplicable to the circumstances of that particular plant.

Accordingly, EPA has sought to provide flexibility in implementing the national standards by allowing variances for existing sources that can demonstrate that their situation is characterized by factors "fundamentally different" from those considered by EPA in developing the national rule for their category. In the direct discharger context, EPA routinely included a fundamentally different factors (FDF) variance clause in each of the first-round, categorical BPT regulations.<sup>7</sup> An FDF variance provision was ultimately included in the generic permit regulations governing all direct dischargers.<sup>8</sup> For indirect dischargers, an FDF variance provision was included in the general Pretreatment Regulations, 40 C.F.R. 403.13. That provision allows EPA to establish a more or less stringent standard if the requester shows (1) that the facility is fundamentally different from other plants in the category with respect to one or more of the statutory factors and (2) that compliance with the national standard would result either in a pollutant removal cost wholly out of proportion to the costs considered by EPA in setting the national standard or a non-water-quality environmental impact fundamentally more adverse than those considered in devel-

<sup>7</sup> See, e.g., 40 C.F.R. 415.62 (1976); *NRDC, Inc. v. EPA*, 537 F.2d 642 (2d Cir. 1976) (rejecting NRDC's challenge to FDF variance clause).

<sup>8</sup> 40 C.F.R. 125.30-32. NRDC has also challenged that regulation in the District of Columbia Circuit. That case has not yet been briefed.



oping the standard. 40 C.F.R. 403.13(c)(2)(iv) and (3)(ii). In effect, the FDF variance creates a new subcategory for the discharger in question based on factors that would have justified—and required—the creation of that subcategory had EPA been aware of those factors or taken them into account during the national rulemaking process.

5. Numerous parties, including respondent Natural Resources Defense Council, Inc. (NRDC), petitioned the United States Court of Appeals for the Third Circuit for review of various aspects of EPA's General Pretreatment Regulations.<sup>9</sup> Only NRDC's challenge to the FDF variance provision is involved in this petition and the petition filed by the Chemical Manufacturers Association, et al. (No. 83-1013). No party has sought review of any other aspect of the court of appeals' decision.

In the court of appeals, NRDC challenged the FDF variance provision on two grounds (see Pet. App. A38-A40). First, NRDC argued that because the Clean Water Act does not specifically authorize FDF variances, EPA lacks the authority to grant them (*id.* at A38-A39). Second, NRDC contended (*id.* at A40) that Section 301(l) of the Act, 33 U.S.C. (Supp. V) 1311(l), which was added to the statute in 1977, specifically prohibits such variances insofar as they apply to toxic pollutants. Section 301(l) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list."

In response to NRDC's first argument, EPA contended (Pet. App. A39) that the statute accords the

<sup>9</sup> 43 Fed. Reg. 27736 (1978), as amended, 46 Fed. Reg. 9404 (1981). Challenges to provisions of EPA's categorical pretreatment standards for existing electroplating sources (44 Fed. Reg. 52580 (1979), as amended, 46 Fed. Reg. 9542 (1981)) were considered at the same time.

Administrator the inherent flexibility to adjust national standards for particular plants. EPA relied on *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), in which this Court held (see *id.* at 128) that EPA may establish nationally binding BPT effluent limitations provided that variances are available for individual plants. With respect to NRDC's second argument, EPA contended (Pet. App. A41) that Section 301(l) was not intended to bar the Agency's longstanding practice of granting FDF variances but was instead meant only to prohibit those modifications authorized by Section 301(c) and (g) of the Act, 33 U.S.C. (Supp. V) 1311 (c) and (g). Section 301(c) authorizes modifications from BAT requirements based on economic affordability. Section 301(g) authorizes BAT modifications based on water quality considerations.

6. The Third Circuit held that Section 301(l) prohibits the granting of FDF variances for toxic pollutants (Pet. App. A36-A43). The court rejected EPA's contention that FDF variances are not the type of "modifications" that Section 301(l) was intended to prohibit (Pet. App. A42-A43). The court found it "difficult to imagine" why Congress would have intended to prohibit Section 301(c) economic affordability modifications but not purportedly "similar" FDF variances (Pet. App. A43). The court recognized (*ibid.*) that its reading of Section 301(l) directly conflicts with *Appalachian Power Co. v. Train*, 620 F.2d 1040 (4th Cir. 1980), which rejected NRDC's argument that Section 301(l) prohibits FDF variances from BPT effluent limitations for direct dischargers. The Third Circuit also rejected (see Pet. App. A39) EPA's contention that this Court's decision in *duPont* supported EPA's authority to grant FDF variances from pretreatment standards.

#### REASONS FOR GRANTING THE PETITION

The decision of the court of appeals creates a clear conflict between circuits with respect to the construc-

tion of Section 301(l) of the Clean Water Act; it is inconsistent with this Court's prior interpretation of the Act; it threatens significant interference with EPA's longstanding plan for implementation of the Act; and it wrongly upsets EPA's reasonable and correct interpretation of Section 301(l). Review by this Court is therefore warranted.

1. In holding that Section 301(l) of the Act forbids FDF variances for toxic pollutants, the Third Circuit acknowledged that its decision conflicts with the Fourth Circuit's construction of the same provision in *Appalachian Power Co. v. Train*, 620 F.2d 1040 (1980). There, the Fourth Circuit rejected NRDC's argument that Section 301(l) prohibits FDF variances for toxic pollutants with respect to BPT effluent limitations for direct dischargers. Stating that EPA's construction of the statute was entitled to deference, the court held that Section 301(l) prohibits only those modifications issued under Section 301(c) and (g). 620 F.2d at 1048. By contrast, the court below, reviewing the identical provision of the Act and virtually identical arguments by the same parties, expressly rejected the Fourth Circuit's holding and found that Section 301(l) prohibits FDF variances for toxic pollutants with respect to pretreatment standards for indirect dischargers.

These two decisions are squarely in conflict. It is of no consequence that *Appalachian Power Co.* involved requirements for direct dischargers, while this case involves those for indirect dischargers. Section 301(l) applies equally to all "requirements" of Section 301, 33 U.S.C. 1317, and Section 307 pretreatment standards, no less than BPT effluent limitations, are "requirements" of Section 301. See 33 U.S.C. 1311(b)(1)(A)(ii). Thus, the two decisions clearly entail conflicting interpretations of the scope of Section 301(l). Absent a resolution by this Court, substantial uncertainty and confusion are likely to interfere with EPA's development and

implementation of national categorical standards for direct and indirect dischargers.

2. The Third Circuit's decision also appears inconsistent with this Court's interpretation of the Clean Water Act in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *EPA v. National Crushed Stone Ass'n*, 449 U.S. 53 (1981). In *duPont*, the Court held that EPA could issue binding effluent limitations for classes of plants rather than merely issuing non-binding guidelines under Section 304, 33 U.S.C. 1314. The Court wrote (449 U.S. at 128 (footnote omitted; emphasis added)): "We conclude that the statute authorizes the [BPT] as well as the [BAT] limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations."<sup>10</sup>

In *National Crushed Stone Ass'n*, the Court reiterated (449 U.S. at 72 (emphasis added)):

No . . . explicit variance provision [like Section 301(c)] exists with respect to BPT standards, but in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulations to classes and categories of point sources. *Id.*, at 128.

The variance provisions to which the Court referred in both cases were those allowing FDF variances from BPT standards, but as previously noted, there is no reason to believe that Section 301(l) applies any differently to such variances than it does to variances from pretreatment standards for indirect dischargers. Thus, the Third Circuit's decision in this case seems contrary to this Court's prior construction of the Act.

<sup>10</sup> However, *duPont* held (430 U.S. at 128) that variances are not appropriate for new source direct dischargers under Section 306 of the Act, 33 U.S.C. 1316. Accordingly, EPA has not allowed FDF variances from pretreatment standards for new source indirect dischargers.



The court of appeals attempted to distinguish this Court's decisions on the following ground (Pet. App. A39):

The Court [in *du Pont*] found that section 301(b)(1) required that "some allowance [be] made for variations in individual plants" under categorical BPT effluent limitations because that section spoke of "effluent limitations for point sources," 33 U.S.C. § 1311(b)(1)(A) (1976), rather than "effluent limitations for categories and classes of point sources," *id.* § 1311(b)(2)(A) (1976 & Supp. I 1977). 430 U.S. at 128. As section 307(b) states that pretreatment standards apply to "categories of sources," *id.* § 1317 (b) (3) (1976), the Administrator is not required under *du Pont* to make any provision for variances from pretreatment standards.

This analysis is plainly flawed. There is nothing in *du Pont* to suggest that the Court's reference to the appropriateness of FDF variances was based upon the statutory requirement that BPT limitations be issued for "point sources." On the contrary, *du Pont* referred to the appropriateness of variances from BAT, as well as BPT, requirements (see 430 U.S. at 128). And BAT requirements are promulgated for "categories and classes" of sources (33 U.S.C. (Supp. V) 1311(b)(2)(A)), much like the pretreatment standards for indirect discharges at issue here, which must be issued for "categories of sources" (see 33 U.S.C. 1317(b)(3)).<sup>11</sup>

3. The Third Circuit's decision presents an issue of fundamental importance to the administration of the

<sup>11</sup> Moreover, EPA—at NRDC's urging—has consistently promulgated BPT-level requirements for industrial categories, just as it does for BAT-level requirements and pretreatment standards. See *NRDC v. Train*, 510 F.2d 682 (D.C. Cir. 1975). Consequently, the distinction relied on by the court of appeals between "point sources" and "categories" of sources was never of practical importance for EPA or NRDC.

Clean Water Act. At least 60,000 existing industrial users of POTWs are potentially subject to national categorical pretreatment standards. It is therefore obvious that the pretreatment program is a critical part of the Act's scheme for restoring and maintaining the quality of the nation's waters. 33 U.S.C. 1251(a).

Within the past two years, EPA has promulgated BAT-level requirements for 20 industrial categories, and it is now moving rapidly toward completion of BPT-level requirements for an additional nine categories within the next year. In addition, EPA has promulgated BPT-level pretreatment standards for eight major industrial categories. All of these regulations were developed under the very rationale that this Court found persuasive in *du Pont*, i.e., that the statute and sound administrative practice envisioned promulgation of categorical regulations with an FDF variance available as a safety valve. If, contrary to the Agency's expectation, FDF variances for toxic pollutants may not be granted, the existing regulations may be more vulnerable to challenge by plants affected by fundamentally different factors.<sup>12</sup>

The court of appeals' interpretation may also delay promulgation of new pretreatment standards. If EPA may not grant FDF variances, it will have to consider every unique feature of every plant within an industrial category in establishing the national rule. Given the stringent deadlines that have been imposed on the Agency—largely as the result of litigation brought by

<sup>12</sup> See, e.g., *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979) (rejecting challenge to BPT effluent limitations guidelines for ore mining direct dischargers because FDF variance procedure was available to address unique plant); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1040-1041 (D.C. Cir. 1978) (finding existence of FDF variance "crucial" to affirmation of BPT standards); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1061 (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978).

NRDC<sup>13</sup>—EPA has found it more appropriate to base its national rulemakings on the more typical plants and to focus on unique situations in the permit process through the FDF variance mechanism.<sup>14</sup> The FDF variance procedure has thus allowed the Agency to implement a national, categorical regulatory scheme without undue delay, while also ensuring that individual plants with fundamentally different factors are not treated unfairly and cannot attempt to bring down the entire national standard due to EPA's failure to consider factors unique to their particular situations. The court of appeals' decision, which restricts EPA ability to grant such variances, threatens to undermine the Agency's past efforts, and to impede its future efforts, in implementing the Clean Water Act.

4. Finally, EPA's construction of Section 301(l) should have been accepted by the court of appeals. "[T]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum v. Bacon*, 457 U.S. 132, 141 (1982). See also, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-451 (1978). Here, neither the language, the legislative history, nor the policy of Section 301(l) provides grounds for overturning the Agency's construction.

a. The statutory language is not clear with respect to the point at issue, and the court of appeals found it necessary to look beyond the language of Section 301(l) to support its result (see Pet. App. A41-A43). As previously noted, Section 301(l) provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Since the term "modification" is

<sup>13</sup> See, e.g., NRDC Consent Decree, note 4, *supra*; *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1974) (establishing deadlines for promulgating first-round BPT effluent limitations guidelines).

<sup>14</sup> Accord, *Kennecott Copper Corp. v. EPA*, *supra*.

used in Section 301(c) and (g), the latter of which was enacted together with Section 301(l) in 1977, this terminology supports EPA's argument that Section 301(l) was intended to apply to modifications made under Section 301(c) and (g) and not to FDF variances. 301

Furthermore, it is doubtful whether FDF variances may properly be termed modifications of requirements of Section 301. We readily acknowledge that pretreatment standards issued after consideration of all relevant factors are requirements of Section 301. But when an FDF variance is granted, the Agency does not really "modify" the proper standards. Instead it recognizes that the standard should have been framed differently in the first place. As this Court has written (*EPA v. National Crushed Stone Ass'n*, 449 U.S. at 77-78), an FDF variance "is an acknowledgement that the uniform \* \* \* limitation was set without reference to the full range of [factors], to which the Administrator was to refer. Insofar as a [categorical] limitation was determined without consideration of a [factor] fundamentally different from those that were considered by the Administrator, that limitation is incomplete." Thus, an FDF variance merely clarifies what Section 301 requires. An FDF variance does not "modify" a requirement of Section 301 any more than a judicial decision correcting an erroneous interpretation of a statute "modifies" what the statute requires.

b. The court of appeals based its interpretation largely upon the legislative history of Section 301(l) (see Pet. App. A42), but the court acknowledged (*ibid.*) that "[t]he legislative history \* \* \* does indicate that Congress was primarily concerned with prohibiting modifications under section 301(c) and (g)."

The court relied (Pet. App. A42) on the fact that certain supporters of the 1977 amendments do not appear to have used the word "modification" as a term of art



but instead employed the terms "waiver" and "modification" interchangeably. However, none of the references upon which the court relied concerned Section 301(l), and they therefore shed little light on the meaning of that provision. Just because a Member of Congress during floor debate referred to Section 301(c) as a "variance" provision, it cannot be inferred, as the court of appeals apparently did (Pet. App. A42), that a majority of both Houses concluded that Section 301(l) applies not only to Section 301(c) modifications but also to nonstatutory FDF variances. Such use of legislative history ignores the realities of the legislative process.

The most telling feature of the legislative history is the absence of any indication that Congress intended to alter EPA's well-established and well-known practice of granting FDF variances. EPA had included FDF variance provisions in numerous BPT rulemakings prior to the 1977 statutory amendments,<sup>18</sup> yet the legislative history is devoid of any reference to or criticism of this consistent agency practice. Similarly, in *du Pont*, which was handed down while the 1977 amendments were under consideration, this Court stated that variances from BPT and BAT requirements are appropriate (430 U.S. at 128), and the legislative history contains no indication that Congress intended to overrule or modify that decision. The court of appeals should not have attributed to Congress an intention to overrule preexisting law in the absence of an express indication of such an intent. See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

c. The only other basis for the court of appeals' interpretation was its erroneous belief that Section 301(c) modifications "serve the same function" as FDF vari-

<sup>18</sup> See, e.g., 40 C.F.R. 415.62 (1976).

ances (Pet. App. A42).<sup>19</sup> Based upon this mistaken understanding, the court concluded (*id.* at A43) that "[i]f Congress was willing to prohibit section 301(c) modifications where toxic pollutants are concerned, it is difficult to imagine why Congress would have permitted similar FDF variances for those same pollutants."

The court of appeals' analysis betrays a fundamental misunderstanding of the nature of both FDF variances and Section 301(c) modifications. As previously noted, an FDF variance effectively creates an appropriate subcategory for the facility in question based on factors that would have justified, if not required, the creation of that subcategory during the rulemaking had EPA been aware of and taken those factors into account. See *National Crushed Stone*, 449 U.S. at 77-78. The economic capabilities of the particular plant would not have dictated alteration of the national standard and may not be taken into account in granting an FDF variance.

<sup>19</sup> In concluding (Pet. App. A42) that Section 301(c) modifications and FDF variances "serve the same function," the court of appeals relied on the following statement in *National Crushed Stone*, 449 U.S. at 74:

A § 301(c) variance \*\*\* creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class.

This statement, however, makes no reference whatsoever to FDF variances from either BPT or BAT standards. The Court was merely pointing out that a Section 301(c) modification results in a standard that is within the economic capability of the discharger. It does not follow, however, as the court of appeals concluded (Pet. App. A42), that this Court viewed Section 301(c) modifications and FDF variances as "serv[ing] the same function." On the contrary, later in *National Crushed Stone* (449 U.S. at 77-78), this Court took pains to point out the significant differences between these two measures.

*EPA v. National Crushed Stone Ass'n, supra*; 40 C.F.R. 403.13(e)(3).<sup>17</sup>

By contrast, a Section 301(c) modification may properly be granted even though EPA correctly categorized the plant in question and fully considered all the relevant factors in developing the national rule. A Section 301(c) modification may be granted if the economic capabilities of the particular plant so warrant and the plant continues to make "reasonable further progress toward the elimination of discharge of pollutants." 33 U.S.C. 1311(c).

In light of these basic differences, there is no reason to assume that Congress intended to treat Section 301(c) modifications and FDF variances in the same way. By prohibiting Section 301(c) modifications for toxic pollutants, Congress determined that elimination of such pollutants must take precedence over the plight of economically weak plants. Prohibiting FDF variances for toxic pollutants, on the other hand, would have an entirely different effect. Such a prohibition would not affect the burden on economically weak firms; nor is it at all clear that it would decrease the level of toxic substances in the nation's waters. Instead, such a prohibition would fundamentally alter the way in which EPA has sought to discharge its dual responsibility to promulgate all applicable effluent limitations and national pretreatment standards on an expeditious basis while at the same time taking into account all relevant factors affecting individual plants.

<sup>17</sup> Similarly, FDF variances, unlike Section 301(g) modifications, are not available based upon water quality considerations. 40 C.F.R. 403.13(e)(4).

## CONCLUSION

The petition for a writ of certiorari should be granted.

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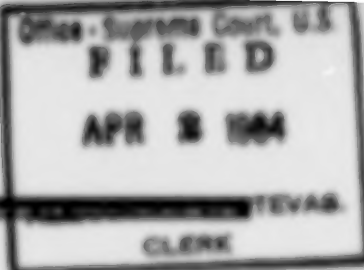
*Environmental Protection Agency*

FEBRUARY 1984

# **RESPONDENT'S BRIEF**



② ②  
Nos. 83-1013, 83-1373



IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent;*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
*Petitioner,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent.*

On Petitions for a Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit

**RESPONDENT'S BRIEF IN OPPOSITION  
TO THE PETITIONS**

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April 2, 1984

32 pp

**BEST AVAILABLE COPY**

**QUESTION PRESENTED**

Whether the Third Circuit correctly held that Section 301(f) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(f), prohibits EPA from granting variances from national pretreatment standards for toxic pollutants.

## **PARTIES**

In addition to those named in the caption, the parties are:  
American Cyanamid Corporation, FMC Corporation, and  
Union Carbide Corporation.

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Nos. 83-1013, 83-1373

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioners,*

v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent.*

**OPINION BELOW**

The opinion of the court of appeals (CMA Pet. App. A1-A96)<sup>2</sup> is reported at 719 F.2d 624.

**STATUTE AND REGULATIONS INVOLVED**

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are reproduced at CMA Pet. App. A116-A121 except for Sections 301(c) and (g), 306(b), 307(d), and 509(b)(1), 33 U.S.C. (& Supp. V) 1311(c) and (g), 1316(b), 1317(d), and 1369(b)(1), which are set forth in the Appendix at A1-A4. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at CMA Pet. App. A122-A127.

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<sup>2</sup>"CMA Pet. App." refers to the appendix to the petition in No. 83-1013. The two petitions from the decision below are distinguished herein by reference to the petitioner. Thus, "CMA Pet." refers to the petition in No. 83-1013 filed by the Chemical Manufacturers Association, *et al.* "EPA Pet." refers to the petition in No. 83-1373 filed by the United States Environmental Protection Agency.



### STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et. seq.*, directs EPA to control two types of industrial polluters: (1) "direct" dischargers, which dump their waste water directly into navigable waters, and (2) "indirect" dischargers, which dump their waste water into municipal sewage treatment plants which, in turn, discharge to navigable waters.

When the law was first enacted, Congress required direct dischargers to meet two progressively more stringent technology-based requirements: "best practicable control technology currently available" (BPT) by July 1, 1977, and "best available technology economically achievable" (BAT) by July 1, 1983 (later amended to July 1, 1984). 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (b)(2)(A) and (C). Indirect dischargers had to meet "pretreatment standards" designed to protect both the environment and the sewage treatment plant. 33 U.S.C. 1311(b)(1)(A) and (2)(A) and 1317(b). The pretreatment standards were especially important because municipal sewage plants are often not designed to treat industrial waste water. Without pretreatment, toxic industrial chemicals can pass through the sewers into rivers and drinking water supplies, contaminate large volumes of sludge, or impair the effectiveness of the sewage treatment plant, negating the benefits of a multi-billion dollar investment in pollution control. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 690-691 (1978) [hereinafter cited as 1977 *Legis. Hist.*]

In 1977, Congress took stock of the law, finding reason for both solace and alarm. Progress controlling conventional pollutants, the principal targets of BPT requirements, had been greater than anticipated. *Id.* at 330, 335, 1101. However, EPA had not issued the pretreatment standards on schedule, to the consternation of both houses of Congress. *Id.* at 691, 1213. In addition, the principal regulatory mechanism for control of toxics had failed, amidst mounting evidence of the seriousness and ubiquity of these pollutants. *Id.* at 325-326, 334, 452.

Congress therefore ordered a "major redirection and refinement" of EPA's regulatory program to strengthen control of toxics. *Id.* at 326. First, it elevated the importance of pretreatment and BAT requirements. It directed EPA to use these requirements to control toxics and, in the case of pretreatment standards, enacted several strengthening amendments. *Id.* at 689-693. Second, it considered when, and under what conditions, sources should be able to obtain variances from BAT and pretreatment requirements. It created a new "safety valve" to give flexibility to BAT limitations,<sup>2</sup> and amended a BAT variance provision that had been in the 1972 law,<sup>3</sup> specifying in each case that these modifications would not be available for toxic pollutants. It did not create any variances from the pollution control requirements of pretreatment standards, but it did allow indirect dischargers to get a "credit" for removal occurring at the municipal sewage treatment plant, in effect splitting the pollution control between the indirect discharger and the sewage treatment plant.<sup>4</sup> Simultaneously, it enacted Section 301(f), 33 U.S.C. (Supp. V) 1311(f), which said: "The Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant \*\*\*." It stressed that EPA could only modify requirements for non-toxic, conventional pollutants, and urged EPA to err on the side of caution in applying this mandate.<sup>5</sup>

Despite these directives, EPA subsequently issued regulations which allowed industries to obtain variances from pretreatment standards for toxic pollutants. 40 C.F.R. 403.13

<sup>2</sup> Section 301(g), 33 U.S.C. (Supp. V) 1311(g), p. A1, *infra*; 1977 *Legis. Hist.*, *supra*, at 674-675.

<sup>3</sup> Section 301(c), 33 U.S.C. 1311(c), p. A1, *infra*; 1977 *Legis. Hist.*, *supra*, at 328-329.

<sup>4</sup> Section 307(b), 33 U.S.C. (Supp. V) 1317(b), 1977 *Legis. Hist.*, *supra*, at 463-462.

<sup>5</sup> *E.g.*, "In order to reemphasize that modifications to BAT are intended for non-toxic, conventional pollutants only, the bill prohibits variances for [toxic] pollutants\*\*\*. The committee's intent is to prohibit both those pollutants known to be toxic or hazardous and those suspected of being toxic or hazardous." 1977 *Legis. Hist.*, *supra*, at 677.

(CMA Pet. App. A122-A127).<sup>6</sup> The Third Circuit held that these so-called "fundamentally different factors" or "FDF" variances violated Section 301(f).

### REASONS FOR DENYING THE PETITIONS

The Third Circuit's decision does not conflict with the decision of any other Circuit, is entirely consistent with this Court's prior interpretation of the Clean Water Act, does not present issues sufficiently important to warrant this Court's attention, and is required by the express language of the statute and the legislative history. Review by this Court is not warranted.

1. The Third Circuit's decision does not conflict with the decision of any other Circuit.

a. The Third Circuit held that Section 301(f) prohibits variances from pretreatment standards for toxic pollutants. No other court of appeals has addressed the applicability of Section 301(f) to pretreatment standards, since all challenges to the variance provision for the pretreatment program were consolidated in the Third Circuit. There is no conflict among the Circuits on this question; hence EPA's fear of "substantial uncertainty and confusion" (EPA Pet. 8) is a non sequitur.

b. Lacking any conflict between the holdings of the Circuits, petitioners complain that the Third Circuit's reasoning is inconsistent with that used by the Fourth Circuit to validate variances from BPT limits for toxic pollutants. See *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1047-1048 (1980).<sup>7</sup> Even if a difference in reasoning between the Circuits were sufficient to warrant this Court's review, no purpose would be served by reviewing the reasoning of either Circuit. The Fourth Circuit wrestled with an issue which will not recur: whether Congress, focused on the future direction of the pollution control program, intended Section 301(f) to apply

<sup>6</sup> The regulations were issued on June 26, 1978, 43 Fed. Reg. 27736-27773, and amended on January 28, 1981, 46 Fed. Reg. 9404-9409.

<sup>7</sup> Petitioners did not even cite *Appalachian Power's* discussion of § 301(f) to the Third Circuit, thus belittling its importance to this case.

retroactively to BPT limits issued before the 1977 amendments. It concluded that Congress did not, relying heavily on the maxim that retroactive application of a statute is not favored. *Id.* at 1047.

That anomaly is not present here, where the pretreatment standards were developed well after the 1977 amendments, nor will it recur in the programs for either direct or indirect dischargers. The focus of the national clean water program shifted in 1977 from development of BPT limits to BAT and pretreatment. The Third Circuit gave EPA a clear directive on how to proceed with the post-1977 standards; there is no contrary directive from any other court.<sup>8</sup>

2. The Third Circuit's decision does not conflict with any decision of this Court.

a. This case has nothing to do with this Court's decision in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). *DuPont* addressed two questions: whether EPA had authority to issue industry-wide regulations for existing plants under the Clean Water Act—it held that EPA had; and whether nonstatutory variances were available for industry-wide standards for new sources under the same Act—it held that they were not.

The question before the Third Circuit was whether Section 301(f), enacted after *duPont*, prohibits FDF variances from pretreatment standards for toxic pollutants. This turns on the meaning of Section 301(f), something *duPont* could not address. Therefore, it is not surprising that the Third Circuit's decision does not even address *duPont* in its discussion of Section 301(f). (CMA Pet. App. A40-A43).

*DuPont* is, of course, relevant to the issue that the Third Circuit declined to address. NRDC argued below that all FDF variances from pretreatment standards were illegal. The Third

<sup>8</sup> A pending case in the D.C. Circuit may raise the issue of the applicability of § 301(f) to BAT requirements for direct dischargers. This case was placed on the court's inactive docket and, regardless of how it is ever resolved, will not affect the pretreatment standards at issue here. *NRDC, et al. v. EPA*, Nos. 80-1807, et al.



Circuit found it unnecessary to reach this issue because it found that EPA had only issued pretreatment standards for toxic pollutants and these cannot be varied due to the restriction in Section 301(f). (CMA Pet. App. A38-A40). EPA has since issued a new FDF variance rule which restricts the availability of the variance to pretreatment standards for nontoxic pollutants. 49 Fed. Reg. 5131-5132 (February 10, 1984). There has been no judicial review of this rule; hence, review by this Court would be premature.

b. Petitioners' arguments are at odds with *duPont*. *DuPont* tried to reconcile the Clean Water Act's description of BPT as a requirement applicable to "point sources" with the overall statutory scheme which calls for BAT (and pretreatment and new source standards) to be set for "categories and classes" of sources. The Court concluded that BPT, like BAT, can be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations." 430 U.S. at 128. *DuPont* did not, as EPA claims, hold that nonstatutory variances are appropriate for BAT requirements. To the contrary, the Court upheld EPA's BAT limits even though they did not contain an FDF variance clause.<sup>9</sup>

*DuPont* did, however, strike down nonstatutory variances for new source standards for reasons equally applicable to pretreatment standards. Both pretreatment and new source standards are set for categories of sources, rather than individual point sources. Cf. § 307(b)(3), 33 U.S.C. 1317(b)(3), with § 306(b), 33 U.S.C. 1316(b), p. A2-A3, *infra*. The pretreatment, unlike BPT limits, are expressly labelled "standards" in the Act. *Id.* Pretreatment, like new source, standards may require "no discharge."<sup>10</sup> As with new source standards,

<sup>9</sup> As the Court explained, "The regulations for each subcategory contain a variance clause, applicable only to the [BPT] limitations." 430 U.S. at 122-123 (emphasis added).

<sup>10</sup> Section 307(b)(1), 33 U.S.C. 1317(b)(1), specifies that a pretreatment standard must "prevent the discharge of any pollutant \*\*\* which \*\*\* interferes with, passes through, or otherwise is incompatible with [the publicly owned treatment works]." (emphasis added).

it is "unlawful for any owner or operator of any source to operate any source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d), p. A4, *infra* (emphasis added). Finally, there is no statutory provision for variances,<sup>11</sup> and a variance provision would be inappropriate because pretreatment, like new source, standards were intended to ensure national uniformity and maximum feasible control.<sup>12</sup> See generally 430 U.S. at 138.

c. This Court has twice spoken on the subject of variances under the Clean Water Act. *DuPont*, *supra*, and *EPA v. National Crushed Stone Assn.*, 449 U.S. 64 (1980).<sup>13</sup> Its decisions are clear and do not conflict with the Third Circuit's decision. There is no need once again to address variances under this Act.

### 3. The FDF variance for indirect dischargers is not sufficiently important to warrant this Court's attention.

a. Few companies are interested in the FDF variance. Approximately 11,316 indirect dischargers (83% of the total)<sup>14</sup> were covered by categorical pretreatment standards when the

<sup>11</sup> Sources may be able to get a "credit" for pollutant removal occurring at the publicly owned treatment works, § 307(b)(1), 33 U.S.C. (Supp. V) 1317(b)(1), but there are no exceptions to the level of control demanded by the standards.

<sup>12</sup> The Senate Committee explained the rationale for pretreatment standards as follows: "The only way to avoid [the contaminated sludge disposal] problem is to prevent, to the maximum extent feasible, the industrial pollutants from entering [the municipal sewage] plant in the first place." 1977 Leg. Hist., *supra*, at 690 (emphasis added). Thus, pretreatment standards are set at the national level, with EPA responsible for seeing that local authorities ensure, at a minimum, compliance with the federal limits. *Id.* at 461, 691-693.

<sup>13</sup> *National Crushed Stone Assn.* held that the considerations underlying BPT and BAT differed; therefore, EPA could not grant BPT variances based on the economic capability of the individual discharger, even though it could grant statutory BAT variances on these grounds.

<sup>14</sup> In 1977, when this rulemaking began, EPA estimated that 60,000 industrial facilities would be covered by categorical pretreatment standards; it now believes that 11,000 is a more accurate estimate. (p. A5-A6, *infra*).

court of appeals rendered its decision.<sup>16</sup> Only 12 companies had applied for an FDF variance.<sup>18</sup>

b. The decision below will have no adverse impact on the administration of the Clean Water Act. It will not, as petitioners theorize, make "existing regulations \*\*\* more vulnerable to challenge by plants affected by fundamentally different factors." (EPA Pet. 11). Deadlines for filing FDF variance applications had expired for over 80% of the sources in the program when the court of appeals rendered its decision. Since only a handful of companies applied, few are situated to challenge the regulations because of alleged differences with other plants in the same industrial category. No useful purpose would be served—indeed, it would delay enforcement of this program—to allow these plants to raise excuses for noncompliance for the first time now that EPA's rules are final.

c. Nor will the decision below affect EPA's ability to issue new pretreatment standards in compliance with the Agency's "stringent deadlines." (EPA Pet. 11) In the first place, since few indirect dischargers avail themselves of the FDF variance, incorporating their concerns in the national rulemaking will not significantly burden EPA.

Second, EPA routinely considers unique features of individual plants in establishing national rules for both direct and indirect dischargers, notwithstanding its desire to focus "on the more typical plants." (EPA Pet. 12). Indeed, requests to establish separate subcategories for one or a few plants which are somehow "different" from others in the same industrial category are a common feature of these rulemakings.<sup>17</sup>

<sup>16</sup> An additional 129 indirect dischargers are covered by standards issued since the court of appeals decision, although no additional variance applications have been filed. (pp. A3-A7, *infra*).

<sup>17</sup> P. A7, *infra*. One company filed variance applications for two plants; another, for 34 plants.

<sup>18</sup> See, e.g., *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 808 n.10 (9th Cir. 1980) (subcategories divided for analytical purposes into subdivisions of one, two, or three plants); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1246 (10th Cir. 1979) (subcategorization of two mills was

(*footnote continued*)

Finally, the courts below have repeatedly extended EPA's deadlines—often with the express consent of NRDC—where the Agency could identify legitimate problems with its data base.<sup>19</sup> There is no reason to believe that they will act any differently in the future, should the data show that some plants present unique compliance problems which merit more extended consideration.

4. The cases petitioners cite do not help their cause. They are either irrelevant<sup>20</sup> or suggest that EPA does not need an FDF variance for the reasons claimed (*i.e.*, for subcategorizing "based on factors that would have justified, if not required, the creation of that subcategory during the rule-making had EPA been aware of and taken those factors into

(*footnote continued*)

arbitrary); *American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1030-1031, (3d Cir. 1975), modified, 540 F.2d 589 (3d Cir. 1975), cert. denied, 435 U.S. 914 (1978) (addressed sole plant in country with water supply problem). Indeed, subcategorization has been one of the most frequently disputed issues in litigation over EPA's effluent limitations. Report of the Effluent Standards and Water Quality Information Advisory Committee, reprinted in *Implementation of the Federal Water Pollution Control Act, Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 197-208 (1976).

<sup>19</sup> EPA's deadlines are embodied in a consent decree entered into with NRDC and approved by the district court in 1976. *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified sub nom. *NRDC v. Condit*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1976), modified sub nom. *NRDC v. Gorsuch*, Nov. 2155-73, et al. (D.D.C. Oct. 26, 1982), modified sub nom. *NRDC v. Ruckelshaus*, Nov. 2155-73, et al. (D.D.C. Aug. 2, 1983 and Jan. 6, 1984). A petition for certiorari, filed by industries challenging provisions of the consent decree other than the deadlines, is now pending before this Court. *Union Carbide Corp., et al., v. Natural Resources Defense Council, Inc., et al.*, No. 83-1345.

<sup>20</sup> None of the cases petitioners cite address Section 301(b). Moreover, *American Iron and Steel Institute*, n.17 *supra*, predated enactment of Section 301(b); *Weyerhaeuser Co. v. Condit*, 590 F.2d 1011 (D.C. Cir. 1978) addressed only economic pollutants; and *Kennecott*, 612 F.2d at 1243, upheld EPA's industry-wide standards relying, in large part, on the statutory obligation to base effluent guidelines on the "best plant," rather than on the FDF variance.

account"). (EPA Pet. 15) (emphasis added).<sup>20</sup> Instead, EPA used the FDF variance as a fig leaf for embarrassingly discordant facts already in the record.<sup>21</sup> This bureaucratic concern, rather than any "issue of fundamental importance to the administration of the Clean Water Act," propels EPA's petition.<sup>22</sup>

**4. The court of appeals correctly decided that the Clean Water Act prohibits FDF variances from pretreatment standards for toxic pollutants.**

Petitioners argue that the court below erred by not accepting EPA's construction of Section 301(f) of the Clean Water Act. An agency's interpretation of a statute is not, however, entitled to deference where, as here, it contradicts

<sup>20</sup> Both *Kaiser* and *AJIS* placed the burden of marshalling information squarely on industry's shoulders. When EPA encountered factors of which it had not been aware (e.g., benzopyrene formation, 612 F.2d at 1240; water scarcity, 126 F.2d at 1090; and engineering factors, 126 F.2d at 1046), the courts found fatal fault with industry's failure to produce adequate information during the rulemaking.

<sup>21</sup> E.g., in *Kaiser*, EPA fell back on the FDF variance when confronted with countervailing factors which it had been "fully aware of" for nearly two years before completing the rulemaking, 612 F.2d at 1240; 40 Fed. Reg. 29771 (1975). Likewise, in *AJIS*, 126 F.2d at 1040, EPA proffered the FDF variance in response to industry criticism of its sludge plant data base, even though the flaw at issue had been clearly pointed out to EPA during the rulemaking, 39 Fed. Reg. 24114, 24117 (1974).

<sup>22</sup> CMA also cites *SEC v. Chertoff*, 312 U.S. 194 (1947), arguing that EPA should have discretion to choose whether to regulate individual plants through general rules or individual, ad hoc decision-making. *Chertoff*, however, is irrelevant because here Congress made the choice for EPA. Congress told EPA to issue standards which prevent harmful pollutants from entering municipal sewage treatment plants, and to "designate the category or categories to which such standard shall apply." Section 307(b)(3), 33 U.S.C. 1317(b)(3). In fact, Congress expressly said that the pretreatment standards "would be national in scope and addressed to the most significant pretreatment problems. [They] would vary with the broad type of treatment processes used, but the Committee does not intend that each individual treatment works would have its pretreatment standards set up by the Administrator." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 95d Cong., 1st Sess. 808 (1975).

the clear language of the statute,<sup>23</sup> is not well-reasoned,<sup>24</sup> and frustrates the statutory scheme for strict control of toxic pollutants.<sup>25</sup>

a. Section 301(f) of the Clean Water Act is clear: it provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Pretreatment standards are indisputably requirements of Section 301. EPA's FDF variance would nonetheless have allowed EPA "on a case-by-case basis" to "adjust" pretreatment standards, making them less stringent for some plants.<sup>26</sup> Relying on both the common usage of the language and the legislative history, the court of appeals correctly ruled that these changes "modify" pretreatment standards so as to fall within the prohibition of Section 301(f). (CMA Pet. App. A40-A43).

b. EPA's construction of the statute, by comparison, is a house of cards. First, EPA draws a negative inference: because Sections 301(c) and (g) use the term "modification,"<sup>27</sup> Congress must have intended to rule out these statutorily created variances, not "nonstatutory" variances such as the FDF. This argument violates the well-established rule that, where Congress has expressly created exceptions to a statute, "nonstatutory" exceptions are not available. *TVA v. Hill*, 437 U.S. 153, 188 (1978). In addition, it makes Section 301(f) largely redundant — at least insofar as it applies to Section 301(g), which by its terms cannot be applied to toxics.

<sup>23</sup> *SEC v. Sloan*, 436 U.S. 103, 117-119 (1978).

<sup>24</sup> *U.S. v. Cartwright*, 411 U.S. 546, 557 (1973).

<sup>25</sup> *Volkswagenwerk v. FMC*, 390 U.S. 261, 272-275 (1968) (rejected narrow reading of statutory provision because it did not square with the structure of the statute).

<sup>26</sup> 40 C.F.R. 403.13(b). (CMA Pet. App. A122). The rules would also have allowed EPA to make pretreatment standards "more stringent," but this addition is purely disingenuous, as all FDF variance applications for both direct and indirect dischargers have sought weaker, not stronger, pollution control limits.

<sup>27</sup> Section 301(c), 33 U.S.C. 1311(c), p. A1, *infra*, allows BAT standards to be modified if they surpass the economic capability of the discharger. Section 301(g), 33 U.S.C. (Supp. V) 1311(g), p. A1-A2, *infra*, allows similar modifications to BAT standards where water quality warrants.



Next, EPA asserts that an FDF variance is not a "modification;" admittedly, "a Member of Congress" used the words "variance" and "modification" interchangeably during floor debate,<sup>28</sup> but this, says EPA, does not suggest that the whole of Congress thought the terms were akin. The speaker was, however, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and principal author of the 1977 amendments on toxics. His words, entitled to considerable weight on their own, are buttressed here by EPA's own interchangeable use of "variance" and "modification" in its Senate testimony,<sup>29</sup> and the equation of the two terms by both the Senate Committee<sup>30</sup> and this Court.<sup>31</sup>

Last, EPA asserts its "most telling" point: Congress did not criticize either the "well-established" practice of granting FDF variances from BPT requirements, or this Court's *duPont* decision when it enacted Section 301(f). EPA's practice was, however, hardly "well-established." Less than 50 of 4,000 major industrial dischargers covered by BPT limits before 1977 had applied for FDF variances; only two plants had actually received a variance. (p. A8-A9, *infra*). Nor would *duPont* have caused Congress to be concerned about variances for BAT and pretreatment requirements since the BAT limits reviewed in *duPont* contained no FDF variance clause (even though the BPT limits did). 430 U.S. at 122-123.

Congress's failure to examine the further theoretical availability of FDF variances in the BPT rules proves nothing. BPT was merely an interim measure before final pollution controls. 1977 *Legis. Hist.*, *supra*, at 459. Since most sources had complied, *Id.* at 641, and the pollution control results had been greater than anticipated, *Id.* at 330-331, Congress had no need to examine carefully EPA's handling of individual dischargers.

<sup>28</sup> 1977 *Legis. Hist.*, *supra*, at 461.

<sup>29</sup> *Id.* at 1102. EPA called the statutory 301(c) modification provision a "variance."

<sup>30</sup> *Id.* at 676-677. The Committee called the statutory 301(g) modification provision a "variance."

<sup>31</sup> In *National Crushed Stone Assn.*, *supra*, this Court referred to the statutory 301(c) modification provision as a "variance."

Moreover, BPT (and the early BAT limits) focused primarily on conventional pollutants, not toxics. *Id.* at 335, 1101. Both Congress's and EPA's attention in 1977 shifted sharply toward control of toxic pollutants and the BAT and pretreatment requirements designed to control them. *Id.* at 1135-1136. Since Congress considered, and curtailed, the circumstances under which these requirements could be modified, it does not make sense to assume that Congress, without mention, would have simultaneously authorized EPA to grant nonstatutory variances for toxic pollutants.

c. Lacking a compelling legal argument, EPA turns to policy, alleging that an FDF variance functions differently from a modification. Put simply, this argument supposes that an FDF variance is not a "variance" at all, but rather a part of the standard-setting process in which EPA recognizes prior errors. The Clean Water Act, however, contains statutory mechanisms for correcting EPA's rulemaking errors. The Act requires EPA to revise its rules following the same streamlined, informal rulemaking procedures used to set pretreatment standards in the first place.<sup>32</sup>

Congress's solution to the problem of rulemaking error is both more direct and more uniform than the variance route EPA created. The FDF variance procedure entails review by four separate tiers of government, an informal public comment period, a hearing, and coordination between EPA's rulemaking experts and diffuse state and regional office personnel.<sup>33</sup> Not surprisingly, the process has been extraordinarily slow of resolution.

<sup>32</sup> Section 307(b)(2), 33 U.S.C. 1317(b)(2), directs EPA to revise pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change," following the same procedures used to set pretreatment standards in the first place. In addition, section 509(b)(1), 33 U.S.C. 1369(b)(1), p. A4, *infra*, gives aggrieved sources 90 days to ask a court to remand EPA's rules unless the challenge is based on information arising after 90 days.

<sup>33</sup> An application is reviewed by the state, the EPA Enforcement Division Director, the EPA Regional Administrator, and the EPA Administrator. 40 C.F.R. 403.13. (CMA Pet. App. A122).

Experience with BPT requirements shows that once a plant files an FDF variance application, it enters a regulatory limbo. Plants which applied for an FDF variance from BPT requirements before 1980 are still awaiting EPA's decision.<sup>14</sup> Some of these applications date to 1976 and 1977. As long as EPA demurs, the applicants are unwilling to make the required capital expenditures for pollution controls. This creates inequity within regulated industries since companies which postpone pollution control expenditures gain a competitive edge over those which pay to install, operate, and maintain controls.

Experience also shows that many variance applications lack merit.<sup>15</sup> Yet variance applications delay enforcement efforts,<sup>16</sup> permitting toxic discharges to continue in excess of the limits intended by Congress. In addition, they reward companies which fail to bring relevant information to EPA's attention during a rulemaking. Congress therefore took a dim view of variances, labelling them "resource-intensive" and "time consuming"<sup>17</sup> and carefully circumscribing, through Section 301(f), their availability where toxic pollutants are concerned.

Petitioners' construction of the Act ignores the clear language of Section 301(f), is inconsonant with the overall statutory scheme for strict control of toxic pollutants, and

<sup>14</sup> Variance applications 76-09, 77-06, 77-14, 77-15, 77-16, 78-02, 78-05, 79-01, and 79-03 are still pending, according to EPA's January 31, 1984 status report.

<sup>15</sup> *E.g.*, EPA approved only four of the 53 BPT variance applications. Fourteen were denied; 16 withdrawn. The rest are still pending. (p. A8-A9, *infra*).

<sup>16</sup> Congress rejected a proposal for case-by-case extensions of the 1977 deadline for meeting BPT limits for this very reason. At the end of EPA's decision-making process, those denied a variance would "almost certainly" appeal to the courts, perhaps obtaining a stay from the applicable requirement. This, in turn, would mean that "these discharges would continue unabated until final judicial resolution, first of the variance, and then, if necessary, of the ensuing enforcement order." 1977 *Legis. Hist.*, *supra*, at 861-862.

<sup>17</sup> *Id.* at 861-862.

would give a handful of companies an unfair competitive advantage over the more than 11,000 sources now embarking on a pollution control program. The Third Circuit correctly rejected it.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,  
FRANCES DUBROWSKI  
*Counsel for the Natural  
Resources Defense Council,  
Inc.*

April 2, 1984

## APPENDIX

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## CLEAN WATER ACT PROVISIONS

## 1. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. 1311(c):

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

## 2. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(g):

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) Such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which

may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

3. Section 306(b) of the Clean Water Act, as amended, 33 U.S.C. 1316(b):

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall at the minimum, include:

- pulp and paper mills;
- paperboard, builders paper and board mills;
- meat product and rendering processing;
- dairy product processing;
- grain mills;
- canned and preserved fruits and vegetables processing;
- canned and preserved seafood processing;
- sugar processing;
- textile mills;
- cement manufacturing;
- feedlots;
- electroplating;
- organic chemicals manufacturing;
- inorganic chemicals manufacturing;
- plastic and synthetic materials manufacturing;
- soap and detergent manufacturing;
- fertilizer manufacturing;
- petroleum refining;
- iron and steel manufacturing;

- nonferrous metals manufacturing;
- phosphate manufacturing;
- steam electric powerplants;
- ferroalloy manufacturing;
- leather tanning and finishing;
- glass and asbestos manufacturing;
- rubber processing; and
- timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

4. Section 307(d) of the Clean Water Act, as amended, 33 U.S.C. 1317(d):

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

5. Section 309(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1369(b)(1):

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 304, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninety-day day.

ESTIMATED NUMBER OF INDIRECT DISCHARGERS  
SUBJECT TO  
CATEGORICAL PRETREATMENT STANDARDS

INDUSTRY CATEGORY	ESTIMATED NUMBER OF INDIRECT DISCHARGERS	FINAL STANDARD
Metal Finishing/Electroplating	10,200	X
Iron and Steel	96	X
Leather Tanning and Finishing	140	X
Aluminum Forming	59	X
Pulp and Paper Mills	250	X
Inorganic Chemicals	44	X
Porcelain Enameling	89	X
Copper Forming	32	X
Organic Chemicals and Plastics	470	—
Textile Mills	930	X
Petroleum Refining	53	X
Foundries	360	—
Coil Coating I and Canmaking	32	X
Electrical and Electronic Components	240	X
Battery Manufacturing	190	—
Nonferrous Metals	63	—
Coal Mining	0	X
Ore Mining	0	X
Steam Electric Power Plants	93	X
Pesticides	38	—
Timber Products	47	X
Pharmaceuticals	270	X
TOTAL	<u>13,696</u>	

PERCENT OF INDUSTRIES COVERED  
BY FINAL STANDARDS

93.8%

These numbers are estimates provided by EPA's Effluent Guidelines Division. Standards have yet to be proposed for Plastics, Molding & Forming and Nonferrous Metals Forming categories.

A-6

[Thirteen categorical pretreatment standards, affecting 11,316 sources, were final in September 1983 when the Third Circuit rendered its decision.]

A-7

March 22, 1984

Jim Gallup  
National Pretreatment Coordinator  
U.S. Environmental Protection Agency  
Waterside Mall, West Tower  
401 M Street SW  
Washington, DC 20460

Dear Jim:

I am writing in response to your request that we provide you with the results of our Freedom of Information Act requests to EPA's Regional Pretreatment Coordinators. On February 23, 1984, we requested the Regional Pretreatment Coordinators to provide us with the following:

"The identity of any indirect dischargers in your Region (or in delegated state programs in your Region) who have sought an FDF variance from a categorical pretreatment standard."

The responses we received were prepared between February 29 and March 10, 1984. They indicate that a total of 12 companies applied for a variance. Most companies filed for a single plant, although one company filed for two of its plants, and another for 24 plants. In addition, another company filed, and then withdrew, an application.

Attached are copies of the responses from each Region so that you can see which companies are involved.

Sincerely,

Frances Dubrowski  
Senior Attorney

cc: Bill Corcoran  
Phil Cummings  
John Doyle  
Bob Hurley  
Ron Outen  
Charlene Sturbitts  
Errol Tyler



[Letter dated February 17, 1984 from Steadman M. Overman, Director, EPA's Office of Legislative Analysis, to Honorable Arlan Stangeland, House of Representatives, enclosing EPA's responses to the questions submitted by Rep. Stangeland to Administrator William D. Ruckelshaus following the latter's testimony before the House Subcommittee on Water Resources.]

\*\*\*\*\*

**Question:** \*\*\* To what extent has the Agency, in the course of implementing the Act since 1972, employed fundamentally different factor variances in implementing the Clean Water Act? How many variances have been issued? For what types of pollutants and which industrial categories? (Please provide a detailed response for the record)

**Response:** \*\*\*\*\* Since the promulgation of effluent limitations guidelines regulations (guidelines) (sic) and the implementation of these guidelines in NPDES permits, there have been 53 FDF determination requests for direct dischargers submitted to EPA Headquarters for approval; there have been four approved, 14 denied, 16 withdrawn and 19 pending requests.

The information requested on the four FDF determination requests for direct dischargers that have been approved appears on the next page.

<u>Facility</u>	<u>Date of Approval</u>	<u>Point Source Category</u>	<u>Pollutants</u>
Southern California Edison Huntington Beach Generating Station	2/22/77	Steam Electric Generating (41 CFR & 423.32(b)(6)) (1974)-Boiler Blowdown	Total Suspended Solids, Oil & Grease, Total Iron, Total Copper
Southern California Edison San Onofre Nuclear Generating Station	2/22/77	Steam Electric Generating (40 CFR & 423.32(b)(6)) (1974)-Boiler Blowdown	Total Suspended Solids, Oil & Grease, Total Iron, Total Copper
Birdhall Sand and Gravel, Oral, South Dakota	7/10/78	Construction Sand and Gravel Subcategory of Mineral Mining and Processing	Total Suspended Solids
Freeport Chemical Company, Uncle Sam Louisiana	6/3/81	Phosphate Subcategory of Fertilizer Manufacturing	Total Phosphorus Fluoride, Total Suspended Solids

\*\*\*\*\*



**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
APR 2 1984

③ ③  
Nos. 83-1413 and 83-1373

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, et al.,  
*Petitioners,*  
v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
*Respondents.*

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*  
v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
*Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE OF THE  
CHAMBER OF COMMERCE OF THE UNITED STATES  
OF AMERICA IN SUPPORT OF THE PETITION FOR  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1980

—  
Nos. 80-1010 and 80-1578  
—

CHEMICAL MANUFACTURERS ASSOCIATION, et al.,  
v. *Petitioners,*

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
*Respondents.*  
—

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
v. *Petitioner,*

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
*Respondents.*  
—

**NOTION OF THE CHAMBER OF COMMERCE OF THE  
UNITED STATES FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE IN SUPPORT OF THE PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT**  
—

The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because the respondent, Natural Resources Defense Council, Inc., declined to consent to the filing of the brief. The petitioners, Chemical Manufacturers Associa-

tion, et al. and the Environmental Protection Agency, have consented to the filing.<sup>1</sup>

This case arose out of the Environmental Protection Agency's ("EPA" or "Agency") regulations governing the establishment of "fundamentally different factors" ("FDF") variances from national pretreatment standards, 40 C.F.R. § 403.13 (1983). The issue presented in this case involves a critical question of statutory construction which goes to the very heart of how EPA administers the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 (1975), that is whether § 101(d) of the CWA, 33 U.S.C. § 1011(d), prohibits EPA from granting FDF variances for any toxic pollutant.

The scope of this issue extends beyond industries covered by pretreatment standards ("indirect dischargers") promulgated by EPA under § 101(b) of the CWA, 33 U.S.C. § 1017(b), and is of interest to all industries regulated by the CWA. The Third Circuit's holding that EPA is prohibited from issuing such variances has a pronounced effect upon industries covered by effluent guidelines ("direct dischargers") promulgated under § 104(b) of the CWA as well. 33 U.S.C. § 1014(b).

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Chamber membership exceeds 200,000, including over 100,000 corporations, partnerships and proprietorships as well as over 1,000 trade associations, and local and state chambers. The Chamber regularly presents its views before this Court and the lower federal courts.<sup>2</sup>

<sup>1</sup> A copy of the Government's consent letter is being filed circumstantially with the attached brief. Counsel for the Chemical Waste Disposal Association has consented orally to the filing.

<sup>2</sup> See, e.g., *Press World Alliance, Inc. v. Thurston*, 710 F.2d 940 (3d Cir. 1983), cert. granted, 53 U.S.L.W. 3005 (U.S. Feb. 27, 1984) (No. 83-607); *Boone v. U.S. Postal Service*, — U.S. —, 73 L.Ed.2d 492 (1983); *Amco Production Co. v. NLRB*, 615 F.2d 527 (3d Cir. 1980).

Both pretreatment standards and effluent guidelines apply to twenty-one major industries and cover sixty-five priority or "toxic" pollutants or groups of pollutants. Many of the Chamber's member companies belong to these industrial groups and are subject to EPA regulation through pretreatment standards and effluent guidelines. Representative industries include coal companies, iron and steel manufacturers and petroleum refineries.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of industry in this case. The decision of the Third Circuit to strike down the use of FDF variances for toxic pollutants in this case has a significant impact upon the membership of the Chamber and the industrial community as a whole.

The Chamber believes it is important for this Court to recognize the significance of this issue to industry in general. It is for this reason that the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1963

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Nos. 63-1013 and 63-1073

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CHEMICAL MANUFACTURERS ASSOCIATION, et al.,  
*Petitioners,*  
v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
*Respondents.*

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U.S. ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*  
v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
*Respondents.*

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BRIEF AMICUS CURIAE OF THE CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF THE PETITION FOR CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

## SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit holds that § 301(l) of the Clean Water Act prohibits FDF variances for toxic pollutants. This decision is fundamentally at odds with *Appalachian Power Co. v. Train*, 620 F.2d 1040 (4th Cir. 1980), and conflicts in principal with the decision of this Court in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). By eliminating the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act, the Third Circuit decision calls into question the legality of existing regulations and the ability of future regulations to be fully representative of industry as a whole.

The Third Circuit's sweeping misinterpretation of section 301(l) of the Clean Water Act goes to the very heart of how the Environmental Protection Agency ("EPA") develops industry-wide regulations for all industrial dischargers, not just those subject to pretreatment standards. The Third Circuit decision not only invalidates the use of FDF variances from pretreatment standards, but also jeopardizes the use of FDF variances generally, thereby threatening EPA's entire regulatory scheme under the Act.

## ARGUMENT

The Environmental Protection Agency ("EPA" or "Agency") regulates two types of industrial dischargers under the Clean Water Act ("CWA" or "Act"). 33 U.S.C. § 1251 (1978). Industries that discharge wastewater directly into waters of the United States ("direct dischargers") are subject to effluent limitations guidelines promulgated under § 304(b) of the CWA. 33 U.S.C. § 1314(b). Industries that discharge into publicly-owned treatment works ("indirect dischargers") are subject to pretreatment standards promulgated under § 307(b) of the Act. 33 U.S.C. § 1317(b).

Both effluent limitations guidelines ("effluent guidelines" or "guidelines") and pretreatment standards are requirements of § 301 of the CWA, 33 U.S.C. § 1311 (b) (2) (A) (i) and (ii), and are based on two levels of water pollution control technology. By July 1, 1977, direct dischargers had to achieve effluent limitations based on the "best practical control technology currently available ("BPT")." 33 U.S.C. § 1311(b) (1) (A). By July 1, 1984, direct dischargers will have to achieve effluent limitations based on the "best available technology economically achievable ("BAT")." 33 U.S.C. § 1311(b) (2) (A).

Although not required by statute, EPA and the respondent, Natural Resources Defense Council, Inc. ("NRDC"), adopted in a consent decree the BPT/BAT approach for developing pretreatment standards for indirect dischargers. *NRDC v. Train*, 8 ERC 2120 (D.D.C. 1976), modified sub nom. *NRDC v. Costle*, 12 ERC 1833 (D.D.C. 1979), modified sub nom. *NRDC v. Gorsuch*, 12 ELR 20570 (D.D.C. 1982), modified sub nom. *NRDC v. Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984). ("the NRDC Consent Decree"). EPA has developed pretreat-

ment standards according to this BPT/BAT approach since 1977.<sup>1</sup>

EPA develops effluent guidelines and pretreatment standards on an industry-wide basis according to specified statutory factors required by § 304(b)(2)(B) of the Act for developing effluent guidelines. 33 U.S.C. § 1314(b)(2)(B). These factors include the age of the equipment and facilities involved, the process employed, the engineering aspects of pollution control techniques, energy impacts and the cost of required effluent reductions but not the ability to pay that cost.

Prior to the decision below, any individual discharger could demonstrate factors "fundamentally different" from those EPA considered when developing industry-wide regulations, including pretreatment standards, and receive an "FDF variance" from those regulations. To apply for a FDF variance from an effluent guideline, a direct discharger would follow the procedures set forth in § 125.30 of the National Pollutant Discharge Elimination System ("NPDES") permit regulations. 40 CFR § 125.30 (1983). To apply for a FDF variance from a pretreatment standard, an indirect discharger would follow the procedures set forth in § 403.13 of the General Pretreatment Regulations. 40 CFR § 403.13 (1983).

The Third Circuit now has invalidated the use of FDF variances for toxic pollutants and remanded the pretreatment variance to the Agency. A-43. In compliance with the lower court decision, EPA has amended § 403.13 of the General Pretreatment Regulations to "make clear that the pretreatment FDF variance provision is not available for toxic pollutants." 49 *Fed. Reg.* 5131, 5132 (1984). Immediate review by this Court is required to

<sup>1</sup> Congress incorporated this consent decree by reference and thereby endorsed this approach to setting effluent guidelines and pretreatment standards in the 1977 Amendments to the Clean Water Act.

resolve the conflict this decision creates in the circuits and to remedy the harm caused by the remand.

# **I. THE ISSUES RAISED IN THIS CASE ARE CRITICAL TO THE DEVELOPMENT OF INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT.**

## **A. FDF Variances Have Become an Established Agency Mechanism for Regulating Atypical Industrial Dischargers.**

Section 301(l) of the CWA provides that "the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a) of this Act."<sup>2</sup> 33 U.S.C. 1311(l). In the decision below, the Third Circuit broadly interprets § 301(l) and holds that "FDF variances for toxic pollutant discharges are forbidden by the Act." A-43. This sweeping interpretation of § 301(l) extends beyond the scope of the General Pretreatment Regulations challenged below and calls into question the validity of FDF variances from effluent guidelines as well.

EPA develops all industry-wide regulations, including pretreatment standards, by combining categorical standards with the opportunity for individual dischargers within each category to apply for a FDF variance. The availability of FDF variances to fundamentally different individual dischargers is an integral part of developing industry-wide regulations and has become an established Agency practice in regulating both direct and indirect dischargers. The decision below to prohibit the use of FDF variances for toxic pollutants critically affects EPA's entire regulatory scheme under the Clean Water

<sup>2</sup> This list was developed by EPA and NRDC as part of the consent decree cited above. See *EDF v. Costle*, 636 F.2d 1229, 1234 (D.C. Cir. 1980).



Act and thereby is of vital concern to virtually all industrial dischargers, not just those subject to the pretreatment regulations challenged below.

For the purposes of developing industry-wide regulations, there is no radical difference between effluent guidelines and pretreatment standards. EPA develops effluent guidelines and pretreatment standards at the same time for twenty-one major industries,<sup>3</sup> covering sixty-five "priority" or toxic pollutants or groups of pollutants. Although the Act is silent on how pretreatment standards should be set, EPA regulates direct and indirect dischargers analogously, based on the same levels of control technology and according to the same technology-based criteria specified by statute for effluent guidelines and agreed to in the NRDC Consent Decree. *EDF v. Costle*, 636 F.2d at 1235.

FDF variances are available to both direct and indirect dischargers and thereby play an important role in the development of industry-wide regulations under the Clean Water Act. The availability of variances for facilities that are fundamentally different from those considered by EPA when developing an industry-wide regulation ensures that similar facilities will be subject to similar treatment. Fair and equitable treatment is essential, especially to individual facilities that EPA overlooked during the national rulemaking process.<sup>4</sup>

<sup>3</sup> The number of industrial categories for which EPA must promulgate BAT toxic standards has changed over the years as a result of a series of modifications to the NRDC Consent Decree. See *supra* text accompanying note 1. In January 1984, BAT standards for nine categories were yet to be promulgated. *NRDC v. Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984).

<sup>4</sup> EPA continually acknowledges through regulation and in pleadings that it may overlook or fail to include factors relevant to a few plants, but not to the industry at large. 40 C.F.R. §§ 25.20, 400.15.

## B. FDF Variances Remedy the Application of Ill-Suited Regulations to Unsampled Plants.

The role of FDF variances in setting effluent guidelines has been upheld by this Court in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and hailed by lower federal courts as "an administrative safety valve" which "permits a more rigorous adherence to an effective regulation." *NRDC v. EPA*, 537 F.2d 642, 647 (2d Cir. 1976) (quoting *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1979)). The availability of FDF variances has helped to expedite EPA's enormously complex task of developing effluent guidelines and pretreatment standards for the 60,000 industrial dischargers regulated under the CWA.<sup>5</sup>

"The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required EPA to restrict itself in the regulation promulgation process to a representative sampling of plants." *NRDC*, 537 F.2d at 647. By coupling the promulgation of national standards with the opportunity to apply for a FDF variance, EPA can regulate these dischargers by industrial category rather than individually. Moreover, without a FDF variance provision, there is no guarantee that EPA could effectively remedy defects resulting from the application of "ill-suited" regulations to "unsampled individual plants." *Id.*

FDF variances also have helped both sets of industry-wide regulations survive legal challenges<sup>6</sup> and have been used as a bargaining device by the Agency to convince

<sup>5</sup> The difficulty EPA has had with complying with its statutory mandate in a timely manner is well-documented. See *supra* text accompanying note 1. See also *CBE v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

<sup>6</sup> *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979). See *Weperhouser Co. v. Costle*, 590 F.2d 1011 (1978).

industry not to challenge regulations.<sup>7</sup> Invalidating FDF variances at this stage of developing guidelines and standards is disruptive, confusing and likely to provoke recurring litigation over the ability of existing regulations to address the atypical plants not previously considered. Without a variance clause to address atypical situations, future regulations also may be the subject of protracted litigation. Quick resolution of this issue will avoid needless litigation expenses on the part of all parties and reduce litigation burdens on the lower courts.

## II. THE THIRD CIRCUIT'S INTERPRETATION OF SECTION 301(l) OF THE CLEAN WATER ACT CREATES AN IRRECONCILABLE CONFLICT IN THE CIRCUITS AND UNDERMINES A PRIOR DECISION OF THIS COURT.

### A. This Case Presents a Critical Question of Statutory Construction Which Affects All Requirements of § 301, Not Just Pretreatment Standards.

In ruling that section 301(l) prohibits FDF variances for toxic pollutants, the Third Circuit rejects the identical arguments presented by EPA and accepted by the Fourth Circuit in *Appalachian Power Co. v. Train*, 620 F.2d 1040 (1980). In both cases, EPA argued that § 301(l) was intended to apply only to specific sections of § 301, specifically § 301(c) and (g). 33 U.S.C. §§ 1311(c) and (g). See *CBE*, 718 F.2d at 1238 n.36. EPA also argued that a FDF variance does not relieve a discharger from complying with § 301. Rather, the FDF variance process subjects an individual discharger to a more appropriate § 301 standard by using data that was

<sup>7</sup> See 48 Fed. Reg. 46944, 46945-6 (1983) (Proposed regulations to implement settlement agreement resolving all legal challenges to effluent guidelines and pretreatment standards for the iron and steel point source category).

not available during the national rulemaking process. *Appalachian Power*, 620 F.2d at 1047.

In *Appalachian Power*, the Fourth Circuit squarely addressed the same issue and arguments presented below, but held that § 301(l) did not apply to FDF variances for toxic pollutants from BPT limitations. These two circuit court decisions cannot be reconciled. The Third Circuit itself expressly states that it "must disagree" with the Fourth Circuit's decision. A-43.

Both circuits frame the issue in general terms, without regard to levels of technology. The Fourth Circuit described the issue before it as whether § 301(l) "prohibits EPA from modifying any of § 301. . . , including BPT limitations, for toxic pollutants." 620 F.2d at 1042 (emphasis added). Similarly, the Third Circuit states the issue below as whether "variances for toxic pollutants are forbidden by section 301(l) of the Act." A-40. Any contention that these decisions can be reconciled is without merit.

The fact that the FDF variance at issue in *Appalachian Power* was from a BPT effluent guideline does not reconcile this conflict in the circuits. The pretreatment standard at issue below and the BPT limitation at issue in *Appalachian Power* both apply to toxic pollutants on the § 307(a) list. 620 F.2d at 1047. Nor does § 301(l) distinguish between levels of technology.

Moreover, § 301(l) does not distinguish between effluent guidelines or pretreatment standards. Rather, § 301(l) expressly applies to "any requirement of [section 301]." (emphasis added). Pretreatment standards are just as much requirements of § 301 as are BPT and BAT effluent limitations. (A-41). See 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A)(i) and (ii). See also H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 84, reprinted in 1977 U.S. Code Cong. & Ad. News 4424, 4459.

This inconsistent treatment by two courts of appeals of the same issues and arguments presented by the same parties creates a clear conflict in the circuits which can be resolved only by this Court's review. Moreover, as previously noted<sup>1</sup>, the Third Circuit has remanded the pretreatment FDF variance provision and ordered EPA to revise the General Pretreatment Regulations to conform with this disparate ruling. A-43. EPA so revised § 403.13(b)(2) on February 10, 1984. 49 *Fed. Reg.* (1984). Accordingly, this Court should grant the petitions for review.

**B. There Is No Radical Difference Between Direct and Indirect Dischargers for the Purposes of Developing Industry-Wide Regulations.**

The decision below also is contrary in principal to the decision of this Court in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). In *duPont*, this Court blessed EPA's regulatory scheme of allowing FDF variances from industry-wide effluent guidelines. This Court held that "the CWA authorizes the 1977 BPT limitations as well as the [1984] BAT limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128 (emphasis added). Subsequent decisions have interpreted *duPont* as requiring FDF variances. *EPA v. National Crushed Stone Association*, 449 U.S. 64, 72 (1980); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978).

In authorizing FDF variances from effluent guidelines, this Court in *duPont* stated that nothing in the CWA "suggests any radical difference in the mechanism used to impose limitations for [BPT] and [BAT]." 430 U.S. at 127. As demonstrated above, there also is no radical difference in the approach EPA uses to develop effluent guidelines and pretreatment standards.

FDF variances are as essential to the development of pretreatment standards as they are to effluent guidelines. Pretreatment standards, like effluent guidelines, are industry-wide regulations for which some allowances for individual variations must be made. The Chamber respectfully submits that the rationale in *duPont* should extend to pretreatment standards as well. Any time EPA sets industry-wide regulations, allowances also must be made for variations in individual plants, as EPA did by including FDF variances from industry-wide pretreatment regulations. The importance of administrative flexibility in ensuring fair and equitable treatment of all industrial dischargers weighs heavily in favor of this Court's granting review here.

**CONCLUSION**

The Third Circuit decision to prohibit FDF variances for toxic pollutants extends beyond the pretreatment regulations challenged below and has a profound effect upon all industries regulated under the Clean Water Act. By prohibiting the use of FDF variances for toxic pollutants from pretreatment standards, the Third Circuit creates an irreconcilable conflict in the circuits and eliminates any allowance for individual plants, as required by this Court in *duPont*.

By eliminating the "flexibility that *duPont* deemed crucial to the legality of any set of industry-wide effluent limitation under the Act," the Third Circuit decision calls into question the legality of existing regulations and the ability of future regulations to fully represent industry as a whole. *Weyerhaeuser*, 590 F.2d at 1033 (emphasis added). The Chamber of Commerce urges this Court to reconcile this conflict in the circuits so that further litigation may be avoided. Accordingly, we respectfully request this Court to grant the petitions for certiorari filed



by the Chemical Manufacturers Association and the Environmental Protection Agency.

Respectfully submitted,

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# **REPLY BRIEF**

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No. 83-1373

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

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REPLY MEMORANDUM FOR THE PETITIONER

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**In the Supreme Court of the United States**

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No. 83-1373

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
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v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

---

**REPLY MEMORANDUM FOR THE PETITIONER**

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1. Respondent contends (Br. in Opp. 4-5) that the decision below does not conflict with *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1047-1048 (4th Cir. 1980), because the latter case concerned variances from *BPT limits for direct dischargers*, whereas the present case concerns variances from *pretreatment standards for indirect dischargers*. We acknowledged this distinction in our petition (Pet. 8) but pointed out that the reasoning of the cases is irreconcilable, as the court below recognized (Pet. App. A43). The statutory provision at issue in this case, Section 301(h) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(h), prohibits the EPA from "modify[ing] any requirement of [Section 301] as it applies to" any toxic pollutant, and it is undisputed that both pretreatment standards and the BPT (and BAT) standards for direct dischargers are requirements of Section 301.



This conflict in reasoning will interfere with completion of those pretreatment and BAT standards that have not yet been promulgated. If the EPA must proceed on the assumption that no such variances will be available, then, as we stated in our petition (at 11-12) the task of developing categorical standards will be made appreciably more difficult and time-consuming. The agency will have to take into account at the rulemaking stage every fundamentally different factor that may affect every covered plant.

No good purpose would be served by waiting for a circuit conflict regarding a particular species of standard. As noted, the reasoning of the Third and Fourth Circuits is irreconcilable and applies equally to all requirements of Section 301 — BPT, BAT, and pretreatment standards. Waiting for such a conflict to develop will only prolong the period of uncertainty regarding the availability of variances from standards for toxic pollutants.

2. Respondent contends (Br. in Opp. 5), on the one hand, that "[t]his case has nothing to do with \* \* \* *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977)." On the other hand, respondent maintains (Br. in Opp. 6) that our arguments in this case "are at odds with *du Pont*." Neither of these conflicting statements is correct.

First, *du Pont* is clearly important here. Both in *E.I. du Pont de Nemours & Co. v. Train*, (430 U.S. 112, 128 (1977)) and in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980), this Court recognized that provisions allowing FDF variances were a "necessary aspect" (449 U.S. at 72) of EPA's practice of issuing categorical effluent limitations. Thus, the decision below, which precludes such variances from standards for toxic pollutants, appears inconsistent with this Court's understanding of how the Clean Water Act works.

Respondent argues (Br. in Opp. 5) that *du Pont* is irrelevant because it did not consider Section 301(h), which was not enacted at the time. As we noted in our petition (at 14), however, what is significant is that Congress, which was considering Section 301(h) when *du Pont* was handed down, carefully considered that decision. Yet there is no indication in the legislative history that Congress disagreed with this Court's understanding of the importance of FDF variances in the Clean Water Act's scheme.<sup>1</sup>

Changing tack, respondent contends (Br. in Opp. 6) that our arguments are inconsistent with *du Pont*. According to respondent, *du Pont* recognized the appropriateness of FDF variances from BPT standards only because those standards are applicable to "point sources." Respondent argues that pretreatment standards, which are set for

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<sup>1</sup>Respondent suggests (Br. in Opp. 12) that *du Pont* would not have caused Congress to be concerned about limiting the availability of FDF variances because the particular BAT limits reviewed in *du Pont* did not contain a FDF variance clause. This argument is specious. First, as previously noted, *du Pont* stated that FDF variances are an important part of the Clean Water Act's overall scheme. It was this pronouncement, rather than the particular BAT standards involved, that would have concerned Congress if it had intended to restrict the availability of such variances. Second, the BPT standards at issue in *du Pont* contained a FDF variance clause and regulated toxic pollutants. Thus, under the court of appeals' construction, that clause was partially invalid.

Respondent also contends (Br. in Opp. 12) that Congress had no reason to refer to FDF variances in the legislative history of the 1977 amendments because a large number of variance applications had not been filed. This argument also plainly lacks merit. FDF variances had been prominently mentioned in *du Pont*; the importance of FDF variances cannot be measured by the number sought or granted (see page 5, *infra*); and Congress had no way of knowing in 1977 how many variances would be sought in the future.

"categories of sources" (33 U.S.C. 1317(b)(3)), are more analogous to BAT and new source standards, which are also described as applicable to categories or classes of sources.<sup>2</sup> Respondent then notes that new source standards are not subject to FDF variances (*du Pont*, 430 U.S. at 137-138), and respondent suggests that the same is true for BAT standards (Br. in Opp. 6-7).

This argument finds no support in *du Pont*. In concluding that FDF variances from BPT limitations are appropriate, this Court in *du Pont* did not rely on the fact that the Act describes such limitations as applicable to "point sources." That connection was concocted by the court of appeals (Pet. App. A39) and respondent, not this Court. On the contrary, *du Pont* strongly suggested (430 U.S. at 127-128) that FDF variances may be granted from BAT standards, which are set for "categories and classes of point sources" (33 U.S.C. 1311(b)(2)(A)).<sup>3</sup>

There is also no merit to respondent's analogy between *new source* standards for direct dischargers and the pretreatment standards applicable to *all* indirect dischargers,

<sup>2</sup>BAT standards for direct dischargers are described as applicable to "categories and classes of point sources" (33 U.S.C. 1311(b)(2)(A)). New source standards are described as applicable to "categories of sources" (33 U.S.C. 1316(b)).

<sup>3</sup>The Court wrote (430 U.S. at 128 (footnote omitted)): "We conclude that the statute authorizes the 1977 [i.e., BPT] limitations, as well as the 1983 [i.e., BAT] limitations to be set by regulation so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." In addition, after noting that BPT standards are described as applicable to "point sources," whereas BAT standards are described as applicable to "categories and classes of point sources," the Court stated (*id.* at 127): "Nothing elsewhere in the Act \* \* \* suggests any radical difference in the mechanism used to impose limitations for the 1977 and 1983 deadlines."

including those already in existence. Both in the case of direct and indirect dischargers, new and existing sources are treated differently.<sup>4</sup> Thus, just because FDF variances are not available for new source direct dischargers — undoubtedly on the theory that such plants can be planned and constructed so as to meet the national standards — it hardly follows that existing indirect dischargers should be treated in the same way.

3. Respondent argues (Br. in Opp. 7-8) that the court of appeals' decision is not important because thus far not many applications have been filed for FDF variances from pretreatment standards for toxic pollutants. However, the importance of FDF variances cannot be measured by the number of applications filed. Such variances serve the function of a safety valve. It is not expected that they will be needed regularly, but when they are needed they play an important role. As we noted in our petition (at 11-12), the availability of such variances for facilities with fundamentally different factors allows the EPA to promulgate national standards more quickly because the agency can concentrate its study on the more typical plants in each category. And after the national standard is issued, the FDF variance procedure prevents a small number of plants with fundamentally different factors from attempting to bring down the entire national standard due to EPA's failure to consider factors unique to their particular situations.

Respondent dismisses (Br. in Opp. 10) EPA's concerns as "bureaucratic," but the fact remains that the FDF variance procedure has facilitated both the promulgation and the

<sup>4</sup>For direct dischargers, compare 33 U.S.C. 1311(b)(1) and (2) with 33 U.S.C. 1316. For indirect dischargers, compare 33 U.S.C. 1317(b) with 33 U.S.C. 1317(c).

successful defense of categorical standards,<sup>5</sup> and the courts have expressly relied upon the availability of such variances in upholding national standards. *E.g.*, *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979).

4. Finally, respondent's arguments (Br. in Opp. 10-15) concerning the meaning of Section 301(h) are far from compelling. Respondent begins (Br. in Opp. 11) with a "plain language" argument that even the court below did not accept (see Pet. App. A41-A42). Respondent then looks to the legislative history (Br. in Opp. 12), but the court below acknowledged (Pet. App. A42) that "[t]he legislative history . . . does indicate that Congress was primarily concerned with prohibiting modifications under section 301(c) and (g)," rather than FDF variances. Respondent chastises us (Br. in Opp. 13) for advancing the "policy" argument that "an FDF variance is not a 'variance' at all, but rather a part of the standard-setting process in which EPA recognizes prior errors." Respondent forgets that this is precisely how *this Court* described an FDF variance in *National Crushed Stone Ass'n*.<sup>6</sup> Respondent concludes (Br. in Opp. 14) with its own dubious "policy" arguments — which contradict the assertions respondent made just a few pages earlier in its brief. Having argued (Br. in Opp. 8-10) that promulgation of national standards will not be greatly delayed and that EPA will not be unduly burdened if the situation of every affected plant must be taken into account during the formal

<sup>5</sup>See *Went, Third Circuit Reopens Basic Water Act Issues by Invalidating FDF Variance*, 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10047 (1984).

<sup>6</sup>This Court wrote (449 U.S. at 77-78):

[T]he variance is an acknowledgement that the uniform . . . limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a . . . limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.

rulemaking proceedings, which typically concern an entire industry, respondent then argues that harmful delay and unacceptable administrative burden will result if EPA entertains application for FDF variances, a much less formal procedure that typically focuses on a single facility. In sum, respondent's arguments concerning the proper interpretation of Section 301(h) fall far short of providing a reason why this Court should deny review.

For these reasons and the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

REX E. LEE  
Solicitor General

APRIL 1984

DOJ-cm004



# **RESPONDENT'S BRIEF**



**In the Supreme Court of the United States**

**OCTOBER TERM, 1983**

**CHEMICAL MANUFACTURERS ASSOCIATION, ET AL.,  
PETITIONERS**

**v.**

**NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.**

**UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, PETITIONER**

**v.**

**NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.**

**ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF FOR THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

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### QUESTION PRESENTED

Whether Section 301(*l*) of the Clean Water Act, 33 U.S.C. 1311(*l*), bars the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to plants having fundamentally different factors from those considered by EPA in establishing the national standards.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-1013

CHEMICAL MANUFACTURERS ASSOCIATION, ET AL.,  
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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No. 83-1373

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1-A88)<sup>1</sup> is reported at 719 F.2d 624.

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<sup>1</sup> "Pet. App." refers to the Appendix to the Petition in No. 83-1013.

## JURISDICTION

The judgment of the court of appeals was entered on September 20, 1983. The petition for a writ of certiorari in No. 83-1013 was filed on December 19, 1983. By order dated December 12, 1983, Justice Brennan extended the time to file a petition for a writ of certiorari in No. 83-1373 until February 17, 1984, and the petition was filed on that date. The petitions were granted, and the cases were consolidated on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reproduced at Pet. App. A116-A121. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at Pet. App. A122-A127.

## STATEMENT

The Clean Water Act, 33 U.S.C. 1251 *et seq.*, requires the Administrator of the United States Environmental Protection Agency (EPA) to regulate two types of industrial facilities: (1) "direct" dischargers, *i.e.*, facilities that discharge waste water directly into navigable waters; and (2) "indirect" dischargers, *i.e.*, facilities that discharge waste water into publicly owned treatment works (POTWs) prior to discharge into navigable waters. For both types of dischargers, EPA conducts rulemaking proceedings and promulgates nationwide, technology-based requirements applicable to categories of dischargers (*e.g.*, iron and steel, metal finishing, and leather tanning).

In each rulemaking proceeding, EPA attempts to gather as much data as possible regarding facilities in the particular category. Nationwide requirements for all plants in that category are based on these data. On occasion, however, the Agency may be unaware of or may not consider a factor that is applicable to a few plants and that would dictate a change in the requirements applicable to those facilities. The EPA has therefore developed a mechanism by which the national requirements may be adjusted, on a case-by-case basis, to better suit those few atypical plants. This vehicle is known as the "fundamentally different factors" (FDF) variance. As its name suggests, this mechanism allows variances for existing sources that can demonstrate that their situation is characterized by factors that are "fundamentally different" from those considered by EPA in developing the national rule for their category.

In this case, the court of appeals held that the Clean Water Act prohibits EPA from issuing such FDF variances to indirect dischargers<sup>2</sup> with respect to all pollutants identified under the Act as toxic. The issue in this case is whether the court's conclusion is correct.

1. Because the agency's regulation of indirect dischargers is patterned after its regulation of direct

<sup>2</sup> The FDF variance provision for indirect dischargers, which was struck down by the court of appeals in this case, is found at 40 C.F.R. 403.13 (Pet. App. A122). EPA has promulgated an analogous provision for direct dischargers, 40 C.F.R. 125.30 *et seq.*, which the respondent herein has challenged in the United States Court of Appeals for the District of Columbia Circuit. *NRDC v. EPA*, No. 80-1607 and consolidated cases. That case has not yet been briefed. As discussed below, the court of appeals' reasoning in this case would apply equally to direct dischargers.

dischargers, a brief review of the statutory scheme applicable to both types of dischargers is necessary. The Act requires direct dischargers to be regulated through phased implementation of technology-based requirements. By July 1, 1977, existing direct dischargers were required to meet effluent limitations based on the "best practicable control technology currently available" (BPT). 33 U.S.C. 1311(b)(1)(A). By July 1, 1984, such dischargers were obligated to meet potentially more stringent effluent limitations for toxic pollutants based upon the "best available technology economically achievable" (BAT). 33 U.S.C. 1311(b)(2)(A) and (C). "New source" direct dischargers must meet new source performance standards (NSPS) based on the "best available demonstrated control technology" (BADT). 33 U.S.C. 1316. The Act required the Administrator to amass a wide range of information and to publish "regulations, providing guidelines," based upon specific criteria, for the BPT and BAT effluent limitations and new source performance standards. 33 U.S.C. 1314(b)(1)(B), (b)(2)(A), and (B). See *E.I. duPont de Nemours & Co. v. Traia*, 430 U.S. 112, 116 (1977) [hereinafter *duPont*].

2. The development of national technology-based requirements for direct and indirect dischargers has proven to be an enormous and complex undertaking. For each industrial category, the Agency and its contractors typically seek to obtain as much information as possible regarding all of the relevant factors, including the types of industrial processes involved, water use practices, the nature and amounts of pollutants in raw waste water, and the costs and effectiveness of various waste water treatment technologies. Questionnaires requesting information on these

matters, as well as cost and financial data, are typically sent to at least a cross section of affected plants. Representative facilities are then selected for visits and on-site sampling in order to gain more detailed information. Data are collected on the treatment efficiency of technologies already being used, and tests are often conducted to determine the feasibility and effectiveness of other potential technologies. In addition, the Agency's contractors attempt to determine model costs (both capital and annualized) for various treatment technologies and, using available financial data, they assess the potential impacts on the industry, including estimated plant closures and the effect on employment and prices. The treatment efficiency of each technology is determined on a national basis through the combined use of statistical analyses and engineering judgments.<sup>5</sup> In most instances, EPA has found that application of one or more of the statu-

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<sup>5</sup> The scope of the task of formulating national categorical standards is illustrated by the procedures followed by EPA in developing the BPT-level electroplating pretreatment standards that were unsuccessfully challenged in the proceedings below. EPA initially sent questionnaires to over 500 plants that it had identified as possibly falling within the category. Of these plants, approximately 200 provided at least some of the requested information. On the basis of the responses, EPA conducted on-site visits of 82 plants to take samples of raw and treated waste water over several days, inspect treatment technology already in place, and collect other first-hand information. These visits enabled EPA to determine that approximately 25 of the plants were representative in terms of treatment technology, character of raw waste water, and other factors. The data from these plants were then used to derive achievable effluent limitations, using a combination of statistical methodologies and engineering judgments.



tory factors warrants different requirements for separate subcategories within the national category.<sup>6</sup>

3. During the rulemaking process, the Agency attempts to obtain all pertinent information. However, due to the magnitude of the effort involved in each categorical rulemaking, the Agency occasionally may not consider a unique factor that applies to a few plants and would dictate a change in the requirements applicable to those facilities. In addition, a particular plant may be so different from all of the other plants considered by the Agency that the factors generally deemed relevant to the treatment capabilities of the other plants are inapplicable to the circumstances of that particular plant.

Moreover, from the outset EPA has been subjected to very stringent court-ordered deadlines for developing these technology-based regulations. Section 304 (b)(1) of the Act, 33 U.S.C. 1314(b)(1), directed EPA to issue BPT guidelines for all industrial categories within one year after the statute's enactment, i.e., by November 1973. This task proved impossible, and in 1973 the respondent herein, the Natural Resources Defense Council, Inc. (NRDC), sued the Agency to establish these guidelines. As a result of this litigation, EPA was placed under a timetable for promulgating BPT effluent limitations guidelines for categories of direct dischargers. *NRDC v. Train*, 6 Env't Rep. Cas. (BNA) 1033 (D.D.C. 1973), rev'd in part and remanded in part, 510 F.2d 692 (D.C. Cir. 1974). Because of these schedules and the fact that the guidelines required under Section 304 of the Act, 33 U.S.C. 1314, had not yet been issued, the

<sup>6</sup> For example, in the BPT electroplating pretreatment rulemaking, the electroplating category was subdivided into seven categories. 40 C.F.R. Pt. 413.

Agency adopted a regulatory approach that combined its obligations under certain provisions of the Act. Specifically, EPA developed "effluent limitations guidelines" for each industrial category. These were intended to constitute both the guidelines required by Section 304 and the nationally applicable effluent limitations that, under Section 301(b), 33 U.S.C. 1311(b), must be achieved by all dischargers within the category.<sup>7</sup> In view of the complexity of the national rulemaking efforts for each category, EPA included in its categorical regulations an FDF variance provision to ensure that facilities with unique, plant-specific factors were not unfairly treated as a result of the tight judicial deadlines.<sup>8</sup>

EPA's approach came under attack from both sides. On the one hand, industry challenged EPA's authority to establish BPT requirements, contending that EPA could only set guidelines under Section 304 of the Act and that only individual permit writers could set the specific effluent limitations applicable to each facility within the category. On the other hand, NRDC, while accepting EPA's authority to establish BPT requirements for categories of dischargers, argued that the Agency could not authorize FDF variances based on plant-specific factors.

A number of courts of appeals issued conflicting rulings with respect to industry's challenge.<sup>9</sup> NRDC's challenge, however, was rejected in *NRDC v. EPA*,

<sup>7</sup> See generally Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Fail the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 Ecology L.Q. 1 (1976).

<sup>8</sup> E.g., 40 C.F.R. 413.220 et seq. (1976) (inorganic chemicals).

<sup>9</sup> See cases collected in *dePont*, 430 U.S. at 128.

537 F.2d 642 (2d Cir. 1976), which upheld the FDF variance provision as an appropriate "administrative safety valve" that "permits a more rigorous adherence to an effective regulation" and that accommodates the need to promulgate national regulations quickly while allowing individual problems to be dealt with later (*id.* at 646-647).<sup>9</sup>

Ultimately, EPA's approach was upheld by this Court in *dePont*. The Court held that EPA had properly construed its authority under Sections 301 and 304 of the Act and that the Agency has the authority to issue nationally applicable regulations for existing direct dischargers, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations" (430 U.S. at 128 (footnote omitted)).<sup>10</sup>

4. The Agency's regulatory effort with respect to indirect dischargers has been patterned after its approach with respect to direct dischargers. Indirect dischargers are subject to "pretreatment" standards applicable to pollutants, including toxic pollutants, that are not susceptible to treatment by or would

<sup>9</sup> The District of Columbia Circuit likewise approved of EPA's approach of setting nationally applicable BPT regulations tempered by the FDF variance mechanism. *American Frozen Food Institute v. Train*, 530 F.2d 107, 111 (1976).

<sup>10</sup> Several courts of appeals subsequently took note of *dePont* in emphasizing the importance of the FDF variance mechanism to the categorical rulemaking process. *E.g.*, *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979); *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1044-1048 (8th Cir. 1980).

interfere with the operation of POTWs.<sup>11</sup> 33 U.S.C. 1317(b). Like the direct discharger requirements, pretreatment standards must be established by notice-and-comment rulemaking for categories of dischargers. 33 U.S.C. 1317(b)(3). And as with direct discharger requirements, EPA was required by Section 304(g)(1) of the Act, 33 U.S.C. 1314(g)(1), to publish guidelines for the establishment of pretreatment standards. EPA decided at an early stage to use the technology-based criteria specified by statute for direct dischargers as the basis for indirect discharger requirements. However, as was the case with the direct discharger requirements, the Agency fell behind in promulgating pretreatment standards, and NRDC soon brought suit seeking a court-ordered schedule for promulgating pretreatment standards. That litigation culminated in a consent decree that placed EPA under stringent deadlines for promulgating categorical pretreatment standards. The decree also incorporated EPA's preferred regulatory approach of using the technology-based BPT, BAT, and NSPS criteria to develop the indirect discharger requirements. *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom.* *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom.* *NRDC v. Gorsuch*, No. 2153 (D.D.C. Oct. 26, 1982), modified *sub nom.* *NRDC v. Ruckelshaus*, No. 2153 (D.D.C. Aug. 2, 1983 & Jan. 6, 1984). In subsequent amendments to the Act in 1977, Congress sanctioned this approach to establishing pretreatment standards. See *Environ-*

<sup>11</sup> Indirect dischargers that would be considered new sources under 33 U.S.C. 1316 if they were direct dischargers are subject to new source pretreatment standards. 33 U.S.C. 1317(c).

*mental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1244 (D.C. Cir. 1980).

Since the pretreatment regulatory effort was patterned after the approach to direct dischargers, when EPA turned its attention to establishing pretreatment standards, it similarly provided an FDF variance mechanism in its General Pretreatment Regulations for existing indirect dischargers. 40 C.F.R. 403.13.<sup>11</sup> This provision allows EPA to establish a *more or less* stringent standard if the affected facility, the POTW, or any other interested person shows (1) that the facility is fundamentally different from other plants in the category with respect to one or more of the factors considered by EPA in establishing the standards and (2) that compliance with the national standard would result either in a pollutant removal cost wholly out of proportion to the costs considered by EPA in setting the national standard or a non-water-quality environmental impact (such as the amount of energy required) that is fundamentally more adverse than those considered in developing the standard. 40 C.F.R. 403.13(c). Among the factors that may justify a variance are the nature, quantity, or combination of pollutants in a particular facility's wastewater; the volume of wastewater discharged by a facility; the amount of energy required for a facility to meet the pretreatment standard; the amount of space available for installation of the required control technology; and the cost of compliance. 40 C.F.R. 403.13(d). However, factors having nothing to do with the appropriateness of the pretreatment standard—such as a particular

<sup>11</sup> In accordance with *duPont* (see 430 U.S. at 137), FDF variances are not allowed for new source indirect dischargers. See 40 C.F.R. 403.13(b).

facility's "ability to pay for the required waste treatment" (40 C.F.R. 403.13(e)(3))—are not grounds for a variance.

The FDF variance does not excuse compliance with a correct requirement but instead represents an acknowledgement that not all relevant factors were taken sufficiently into account in framing the requirement in the first place. As the Agency has described it (44 Fed. Reg. 32854, 32893 (1979)):

No discharger \* \* \* may be excused from the Act's requirement to meet \* \* \* a pretreatment standard through this variance clause. A discharger may instead receive an individualized definition of such a \* \* \* standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act.

In effect, the FDF variance creates a new subcategory for the discharger in question based on factors that would have justified—and required—the creation of that subcategory had EPA been aware of those factors or taken them into account during the national rulemaking process.

5. In a petition for review filed in the United States Court of Appeals for the Third Circuit, NRDC challenged the FDF variance provision on two grounds (see Pet. App. A38-A40).<sup>12</sup> First, NRDC argued that because the Clean Water Act does not specifically authorize FDF variances, EPA lacks the

<sup>12</sup> The court of appeals also considered challenges by numerous parties to various aspects of EPA's General Pretreatment Regulations, 43 Fed. Reg. 27736 (1978), as amended, 46 Fed. Reg. 9404 (1981), and to EPA's categorical pretreatment standards for existing electroplating sources, 44 Fed. Reg. 52590 (1979), as amended, 46 Fed. Reg. 9462 (1981).



authority to grant them (*id.* at A38-A39). Second, NRDC contended (*id.* at A40) that Section 301(l) of the Act, 33 U.S.C. 1311(l), which was added to the statute in 1977, specifically prohibits such variances insofar as they apply to toxic pollutants. Section 301(l) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list."

In response to NRDC's first argument, EPA contended (Pet. App. A39) that the statute accords the Administrator the discretion to adjust national standards for particular plants. EPA relied on *duPont*, in which this Court held (see 430 U.S. at 128) that EPA may establish nationally binding BPT effluent limitations guidelines provided that variances are available for individual plants. With respect to NRDC's second argument, EPA argued (Pet. App. A41) that Section 301(l) was not intended to bar the Agency's longstanding practice of granting FDF variances but was instead meant only to prohibit those modifications authorized by Section 301(c) and (g) of the Act, 33 U.S.C. 1311(c) and (g), which allow modifications of BAT requirements based, respectively, on a facility's inability to afford installation of the required control technology and the high quality of the waters into which the discharge will be made.

6. The court of appeals held that Section 301(l) prohibits the granting of FDF variances for toxic pollutants (Pet. App. A36-A43). The court rejected (Pet. App. A39) EPA's contention that this Court's decision in *duPont* supported EPA's authority to grant FDF variances from pretreatment standards. The court also rejected EPA's contention that FDF

variances are not the type of "modifications" that Section 301(l) was intended to prohibit (Pet. App. A42-A43). While acknowledging that "[t]he legislative history of Section 301(l) does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)," the court concluded (Pet. App. A42 (footnote omitted)) that Congress did not "use[] 'modification' as a term of art so as to exclude variance provisions from the proscription of section 301(l)." The court also perceived no difference between "the policy behind FDF variances" and "the policies behind the 'modification' provisions" (Pet. App. A42). The court found it "difficult to imagine" why Congress would have intended to prohibit Section 301(l) economic affordability modifications but not purportedly "similar" FDF variances (Pet. App. A43).<sup>12</sup>

## SUMMARY OF ARGUMENT

### I

Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Administrator of the Environmental Protection Agency was given the responsibility of issuing regulations establishing limitations on the discharge of pollutants by industrial facilities. By statute and judicial decree, demanding timetables for the promulgation of these requirements have been set.

In discharging these responsibilities, the EPA first confronted the task of establishing limitations for "direct" dischargers—plants that discharge waste directly into navigable waters. In an effort to issue

<sup>12</sup> The court recognized (Pet. App. A43) that its reading of Section 301(l) directly conflicts with that of the Fourth Circuit in *Appalachian Power Co. v. Train*, *supra*.



those requirements as soon as possible, EPA decided to promulgate effluent limitations guidelines for categories of facilities—e.g., all iron and steel mills or all leather tanning plants—and to base those requirements primarily upon data concerning representative or typical plants. Among other things, the agency considered the types and quantities of pollutants in a typical plant's waste water and the effectiveness and cost of various methods of eliminating these pollutants.

Because the categorical regulations were based upon a study of representative plants, EPA realized that its calculations might not be valid for all plants. For example, some plants might produce waste water with different types or quantities of pollutants; the methods of pollutant control employed by most plants might be impractical or ineffective; and the cost of complying with the categorical limitations might differ greatly from the costs considered by the Agency. In order to adapt the categorical limitations to these plants, EPA developed the practice of granting variances to those facilities able to demonstrate that they faced factors fundamentally different from those that the agency had considered in framing the categorical standards. EPA called these "fundamentally different factors" or "FDF" variances.

An FDF variance is substantively the same as an amendment refining the categorical standard to take into account factors that the Agency did not sufficiently consider in setting that standard in the first place. As this Court has explained (*EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 77-78 (1980)), an FDF "variance is an acknowledgment that the uniform . . . limitation was set without reference to the full range of current practices, to which the Ad-

ministrator was to refer. Insofar as a . . . limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete."

In *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), EPA's approach to these problems was sustained. The Court held (*id.* at 128) that EPA has the authority to issue regulations setting effluent limitations for categories of facilities "so long as some allowance is made for variations in individual plants," as EPA had done through its FDF variance provisions. See also *EPA v. National Crushed Stone Ass'n*, 449 U.S. at 72.

When the agency turned to the task of setting pretreatment standards for "indirect" dischargers—facilities that discharge their waste water into publicly owned treatment works—EPA followed the same approach previously used for direct dischargers. That approach was not proscribed, in EPA's view, by the enactment in 1977 of Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), which forbids the EPA to "modify" any effluent limitation or pretreatment standard for a toxic pollutant. EPA has interpreted this provision as affecting, not FDF variances, but those "modifications" authorized by Section 301(*c*) and (*g*). Section 301(*c*) and (*g*) modifications may be granted based upon a facility's financial weakness or the high quality of the water into which the discharge will be made—factors that obviously would not justify any change in the categorical standard and that accordingly are not grounds for an FDF variance. The court of appeals was mistaken in reading Section 301(*l*) as applying to FDF variances, as well as Section 301(*c*) and (*g*) modifications.

## II

This case cannot be decided by looking only at the language of Section 301(l). There is no denying the fact that an FDF variance "modifies" an effluent limitation or pretreatment standard in the dictionary sense of the word, i.e., it changes or alters those requirements. But construing Section 301(l) to prohibit any change or alteration in an effluent limitation or pretreatment standard for a toxic pollutant would bring that provision into conflict with another section of the Clean Water Act and would lead to absurd results that Congress could not have intended. A literalistic interpretation of Section 301(l) would prohibit far more than FDF variances for toxic pollutants; it would mean that effluent limitations and pretreatment standards for toxic pollutants, once issued, could never be amended by the Agency. EPA would be powerless to change its rules, even if it discovered an error in its previous analysis, compiled more accurate or more complete data, or found that technological progress had been made.

It is impossible to believe that Congress intended such absurd results. Indeed, Congress has specifically required EPA to "revise" its standards, including those for toxic pollutants, as technology and other factors change. 33 U.S.C. 1317(b)(2). Since EPA is commanded to "revise" but not to "modify" its requirements for toxic substances, it cannot plausibly be argued that the statutory language clearly supports the court of appeals' interpretation.

EPA's interpretation, on the other hand, gives the term "modify" a consistent interpretation in Section 301(c), (g), and (l).

## III

The court of appeals acknowledged (Pet. App. A42 (footnote omitted)) that "[t]he legislative history \* \* \* does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)." In fact, the only legislative history directly relevant to the question presented here indicates that Section 301(l) was intended to affect modifications sought under Section 301(c) and (g). See pages 27-28, *infra*.

In rejecting this interpretation of Section 301(l), the court of appeals relied on the fact that Section 301(c) and (g) were described in passing during congressional debate as "variance" provisions. However, just because Section 301(c) and (g), which are affected by Section 301(l), were described as "variance" provisions, it obviously does not follow that every other "variance" provision is likewise within Section 301(l)'s scope.

## IV

Since the statutory language and legislative history provide no clear support for the court of appeals' and respondent's construction of the Act, the only remaining question is whether the agency has adopted "a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5 (footnote omitted).

Here, there can be no doubt that the EPA's interpretation was permissible. As already noted, it is inconceivable that Congress intended to prevent EPA from amending its effluent limitations and pretreatment standards for toxic pollutants, and an FDF variance is substantively the same as such an amendment. Both "modify" requirements of Section 301 in

the same way. Since neither the court of appeals nor respondent has questioned EPA's authority to amend its regulations relating to toxic pollutants, it is puzzling why they believe that FDF variances stand on a different footing. To be sure, the procedure for adopting an FDF variance differs from the procedure for amending a rule, but there is no evidence that Section 301(l) was at all concerned with such procedural questions. Nor is there reason to believe that the rulemaking procedure is preferable. At all events, if deference to an agency's interpretation of the statute it administers means anything, it surely must mean that the agency is free, in the absence of congressional direction, to choose between these two procedures.

#### ARGUMENT

##### THE EPA MAY GRANT "FUNDAMENTALLY DIFFERENT FACTORS" (FDF) VARIANCES FROM PRETREATMENT STANDARDS FOR ALL POLLUTANTS

###### A. The EPA's Practice of Allowing FDF Variances for Existing Direct and Indirect Dischargers Constitutes a Reasonable and Permissible Exercise of Discretion Under the Statute

Although the Clean Water Act does not specifically empower the Environmental Protection Agency to grant FDF variances for either direct or indirect dischargers, the EPA is clearly authorized to do so, as this Court's decisions in *duPont* and *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980), established. The FDF variance provision for existing indirect dischargers was first promulgated in 1978, but its roots lie in EPA's regulatory program for direct dischargers, on which the pretreatment effort is

patterned. See pages 8-9, *supra*. In *duPont*, this Court upheld EPA's authority to establish binding BPT and BAT effluent limitations for categories of existing direct dischargers, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations" (430 U.S. at 128 (footnote omitted)). In *National Crushed Stone Ass'n*, the Court reiterated (449 U.S. at 72):

No . . . explicit variance provision exists with respect to BPT standards, but in *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulations to classes and categories of point sources. *Id.*, at 128.

What the Court said in these cases about FDF variances for direct dischargers applies equally to FDF variances for indirect dischargers.

The factors that make the FDF variance provision appropriate in the direct discharger context are no less applicable in the case of indirect dischargers. As noted, regulations for both types of dischargers must be developed under stringent timetables. During this period, the Agency is required to collect and analyze large amounts of technical information concerning complex industrial categories. The possibility that EPA might overlook or fail adequately to consider unique factors applicable to a few atypical plants during the categorical rulemaking process is just as likely in the indirect discharger context as in the direct discharger context. It is thus equally important that the Agency's nationally binding categorical pretreatment standards for indirect dischargers be tempered with the flexibility that the FDF variance mechanism offers.



Both the court below and respondents have attempted to distinguish *duPont* on specious grounds. Both argue (Pet. App. A39; Br. in Opp. 6-7) that *duPont* sanctioned FDF variances only in the case of BPT limitations and that variances are appropriate in that context only because BPT limitations are described by statute as applicable to individual "point sources" (33 U.S.C. 1311(b)(1)(A)). Since pretreatment standards for indirect dischargers are described as applicable to "categories of sources" (33 U.S.C. 1317(b)(3)), it is argued that *duPont* does not support the granting of FDF variances to indirect dischargers. Respondent amplifies this argument (Br. in Opp. 6-7) by noting that in *duPont* the Court agreed with EPA (430 U.S. at 137-139) that FDF variances may not be granted in the case of "new source" standards for direct dischargers, which are described as applicable to "categories of sources" (33 U.S.C. 1316(b)(3)). Since this language is similar to that employed in describing the pretreatment standards, respondent deduces that FDF variances may not be granted to indirect dischargers.

The court of appeals' and respondents' analysis is plainly flawed. In the first place, *duPont* sanctioned FDF variances from BAT, as well as BPT, limitations, and BAT limitations apply to "categories and classes of point sources" (33 U.S.C. 1311(b)(7)(A)). The Court stated (430 U.S. at 128 (footnote omitted)):

We conclude that the statute authorizes the 1977 [i.e., BPT] limitations as well as the 1983<sup>10</sup>

<sup>10</sup> When *duPont* was decided, the Act required compliance with BAT standards by July 1, 1983. 33 U.S.C. (1976 ed.) 1311(b)(2)(A). See 430 U.S. at 118 n.5. Later in 1977, this date was extended until July 1, 1984. 33 U.S.C. 1311(b)(2)(A).

[i.e., BAT] limitations to be set by regulation, as long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 [i.e., BPT] limitations.

Moreover, the essence of the court of appeals' and respondent's argument—that Congress intended for BPT limitations to be set on a more individualized basis than BAT limitations or pretreatment standards—is contrary to *duPont*'s reasoning. In *duPont*, the Court upheld EPA's authority to issue regulations establishing effluent limitations for classes of plants and rejected the argument that those limitations could only be set in individual permits. The Court first concluded (430 U.S. at 126-127) that the BAT limitations may be set on a categorical basis. The Court then turned (*id.* at 127) to the difference in the statutory language used to describe the BPT and BAT limitations. The Court held (*id.* at 127-128), however, that the BPT limitations could also be set by regulation. The Court noted (*id.* at 127) that "[n]othing elsewhere in the Act . . . suggests any radical difference in the mechanism used to impose limitations for the [BPT] and [BAT] deadlines." The argument upon which the court of appeals and respondent rely flies in the face of this reasoning.

<sup>11</sup> Respondent's reliance upon this difference in the statutory language is all the more unconvincing in light of respondent's insistence for more than a decade that BPT direct discharger requirements be set for industrial categories of sources, just like BAT direct discharger requirements, new source performance standards, and pretreatment standards. See *NRDC v. Frois*, 6 Env't Rep. Cas. (BNA) 1083 (D.D.C.



The court of appeals' interpretation of the statute also proves more than that Court was willing to accept or acknowledge, for it means that no FDF variances may be granted to indirect dischargers, not just that variances may not be granted for toxic pollutants. Respondent, by analogizing pretreatment standards to new source standards (from which FDF variances have never been granted<sup>16</sup>), points up this conclusion. However, not only is this conclusion inconsistent with *duPont*, for the reasons stated, but the analogy between new source standards and pretreatment standards applicable to all indirect dischargers, including those already in existence prior to the issuance of the standards, is obviously invalid. Both in the case of

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1973), *rev'd in part and remanded in part*, 519 F.2d 692 (D.C. Cir. 1974).

Respondent has attempted (Br. in Opp. 6-7) to distinguish pretreatment standards from direct discharger BPT requirements on other grounds, but none of the distinctions is valid.

Respondent claims (Br. in Opp. 6) that a pretreatment standard may require "no discharge." So may a BPT regulation—and many have done so.

Respondent observes (Br. in Opp. 6-7) that "it is unlawful for any owner or operator of any source to operate any source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d). However, the same is true with respect to BPT limitations. Once a permit is issued to a direct discharger incorporating a BPT limit, it is illegal for that source to discharge in violation of the permit. Sections 301 and 309 of the Clean Water Act, 33 U.S.C. 1311 and 1319.

<sup>16</sup> Accordingly, the regulation at issue here does not allow FDF variances for new source indirect dischargers. 40 C.F.R. 401.11.

direct and indirect dischargers, new and existing sources are treated differently.<sup>17</sup> FDF variances are not available for new source direct or indirect dischargers because such plants can be planned and constructed so as to meet the national standards. It hardly follows, however, that existing indirect dischargers should be treated in the same way. On the contrary, as previously noted, existing indirect dischargers have just as much need for FDF variances as existing direct dischargers.

In sum, *duPont* and *National Crushed Stone Ass'n* settled the question of EPA's authority to issue FDF variances from categorical effluent standards. The remaining question here is whether Section 301(l) of the Act, 33 U.S.C. 1311(l), prohibits such variances in the case of toxic pollutants.

#### **B. Section 301(l) of the Act Does Not Prohibit FDF Variances From Categorical Pretreatment Standards for Toxic Pollutants**

This Court has recognized that the EPA's interpretation of the Clean Water Act is entitled to substantial deference. *EPA v. National Crushed Stone Ass'n*, 449 U.S. at 83. See also *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 556 (1980); *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976). To sustain the Agency's position, a court need not "go[] so far as to hold that \* \* \* [EPA's] construction of the Act was the only one it permissibly could have adopted." *Train v. NRDC*, 421 U.S. 60, 75 (1975) (Clean Air Act). Instead, a court must find only that EPA's construc-

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<sup>17</sup> For direct dischargers, compare 33 U.S.C. 1311(b)(1) and (2) with 33 U.S.C. 1316. For indirect dischargers, compare 33 U.S.C. 1317(b) with 33 U.S.C. 1317(c).

tion of this "complex statute" is "sufficiently reasonable to preclude the [court] from substituting its judgment for that of the Agency" (*id.* at 87). See also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7. Under this standard, EPA's interpretation of Section 301(l) of the Act, 33 U.S.C. 1311(l), clearly should have been sustained.

**1. The Language of Section 301(l) does not support the court of appeals' interpretation**

The court of appeals held that the language of Section 301 (l) clearly prohibits FDF variances (Pet. App. A42),<sup>18</sup> and it cannot be denied that on first reading the statutory language appears to support the Third Circuit's analysis. Section 301(l) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list." A national categorical pretreatment standard is unquestionably a "requirement" of Section 301(b)(1)(A)(ii), 33 U.S.C. 1311(b)(1)(A)(ii), and an FDF variance "modifies" such a standard in the dictionary sense of the word, *i.e.*, it changes or alters it. See *Webster's Third New International Dictionary* 1452 (1976). Thus, if we go no further, the Third Circuit's decision seems correct.

This Court, however, does not "make a fortress out of the dictionary" and has therefore "consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended con-

<sup>18</sup> By contrast, the Fourth Circuit found the language of Section 301(l) to be unclear and therefore deferred to the EPA's reasonable construction. *Appalachian Power Co. v. Train*, 620 F.2d at 1044-1048.

texts." *Farmers Irrigation Co. v. McComb*, 337 U.S. 755, 764 (1949) (footnote omitted); see also *Watt v. Alaska*, 451 U.S. 259, 266 (1981). The problem with a literalistic interpretation of Section 301(l) is that it conflicts with other provisions of the Act and would lead to unreasonable results that Congress could not have intended. Under this interpretation, a limitation or standard for a toxic pollutant, once promulgated by EPA, could never be changed by the Agency for any reason, because any such change would be a proscribed "modification." Neither the discovery of an error in the Agency's previous analysis, the compilation of better or more accurate data, or subsequent scientific developments would allow the Agency to change the standard. Not only would FDF variances be prohibited, but administrative amendment or repeal of the standard would likewise be precluded. Unless Congress acted, the standard would remain unchanged.

It seems clear that Congress did not intend such results. Having entrusted the EPA with the responsibility for issuing requirements regarding toxic pollutants in the first place, Congress could not have wanted to prevent the Agency from altering those requirements after promulgation, as circumstances warrant. Indeed, far from precluding such alteration, in Section 307(b)(2), 33 U.S.C. 1317(b)(2), Congress provided that the EPA must "revise" its pretreatment standards, including those for toxic pollutants (see 33 U.S.C. 1317(b)(1)), "from time to time, as control technology, processes, operating methods, or other alternatives change." In our view, a statute that commands EPA to "revise" pretreatment standards for toxic pollutants but not to "modify" them is not "clear" on its face, as the court below

believed (Pet. App. A42) and as respondent maintains (Br. in Opp. 11).

If Section 301(l) does not prohibit all "modifications" in the literal sense, the question is which changes are allowed and which are proscribed. EPA's position has always been that Section 301(l) prohibits, in the case of toxic pollutants, those statutory modifications that are otherwise allowed under Section 301(c) and (g). As this Court has noted (*EPA v. National Crushed Stone Ass'n*, 449 U.S. at 71-72 (footnote omitted)):

A variance under § 301(c) may be obtained upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Thus, the economic ability of the individual operator to meet the costs of effluent reductions may in some circumstances justify granting a variance from the 1987 limitations.

Under Section 301(g), the BAT limitations for any non-toxic pollutants may be modified based upon the quality of the water into which the discharge will be made.

EPA's construction is supported by the fact that the identical term—"modification"—is used in Section 301(c), (g) and (l). It is, of course, a canon of statutory interpretation that a term is presumed to have the same meaning in different portions of the same statute. *Bankamerica Corp. v. United States*, No. 81-1487 (June 8, 1983), slip op. 6-7; *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, No. 81-1891

(May 24, 1983), slip op. 9; *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). EPA's interpretation also finds support in the legislative history. And most important, it gives Section 301(l) a reasonable meaning that is consistent with the purpose of that provision.

**2. The legislative history of Section 301(l) indicates that Congress did intend to prohibit FDF variances**

Although the court of appeals stated (Pet. App. A43) that the meaning of Section 301(l) is "clear," the court looked beyond the language of the statute to the legislative history. However, instead of supporting the court of appeals' construction of the Act, the legislative history of the 1977 amendments buttresses EPA's view that Section 301(l)'s proscription was not directed to FDF variances. In accordance with EPA's interpretation, the legislative history indicates that Congress was focusing on the statutory modifications explicitly authorized by Section 301(c) and (g). Representative Roberts, the House floor manager of the Act, stated with regard to the Conference Committee bill:

Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *Legislative History of the Clean Water Act of 1977*, at 328-329 (1978) [hereinafter



*Leg. Hist.*].<sup>20</sup> Similarly, Senator Muskie, the Act's primary author and then Chairman of the Senate Committee on Environment and Public Works, directed his attention to Section 301(c) and (g) modifications without mentioning the FDF variance provision. *Leg. Hist.* 458, 461.

The court below reviewed this legislative history and agreed with EPA that it "does indicate that Congress was primarily concerned with prohibiting modifications under section 301(c) and (g)" (Pet. App. A42 (footnote omitted)). But relying (*ibid.*) on the fact that supporters of the 1977 amendments at times referred to Section 301(c) and (g) as "waiver" or "variance" provisions, the court found (Pet. App. A42) that Congress did not appear to have "used 'modification' as a term of art so as to exclude variance provisions from the proscription of section 301(l)." However, those references shed little light on the meaning of that provision. Just because Section 301(c) was described in passing during floor debate as a "variance" provision, it cannot be inferred, as the court of appeals apparently did (Pet. App. A42), that Congress intended for Section 301(l) to apply to every "variance" provision. The court of appeals was guilty of bad logic and of ignoring the realities of the legislative process.

A far more telling feature of the legislative history is the absence of any indication that Congress intended to alter EPA's well-established and well-known practice of granting FDF variances. EPA had included FDF variance provisions in numerous BPT

<sup>20</sup> Congressman Roberts went on to note that, in contrast, certain pollutants not listed as toxic, known as nonconventional pollutants, "will be subject to waivers under section 301(c) \* \* \* and section 301(g) \* \* \*." *Leg. Hist.* 331.

regulations prior to the 1977 statutory amendments.<sup>21</sup> Similarly, in *dePue*, which was handed down while the 1977 amendments were under consideration, this Court stated that variances from BPT and BAT requirements are appropriate (430 U.S. at 128). Surely, had Congress intended to alter the Agency's practice of authorizing FDF variances, or to legislatively reverse *dePue*, Congress would have made that intention clear, just as it expressed its intention to limit the availability of Section 301(c) and (g) modifications. But no member of Congress, including the bill's leading sponsors in the House and Senate, expressed such an intent. In the absence of an express indication of an intent to overrule this preexisting law, the Third Circuit erred in ascribing such an intent to Congress. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

Respondent has taken issue with this argument on several grounds. First, respondent has asserted (Br. in Opp. 12) that Congress had no reason to refer to FDF variances because relatively few dischargers had applied for variances from BPT requirements by 1977. But irrespective of the number of the applicants, it is clear that by 1977 the FDF variance was a well-entrenched feature of EPA practice that could not have escaped Congress's notice. Not only did BPT regulations routinely contain a provision allowing such variances but, as noted, FDF variances had been prominently discussed in *dePue*.

Respondent also contends (Br. in Opp. 12) that in 1977 Congress had no need to address this Court's opinion in *dePue* because the BAT regulations involved in that case did not include an FDF variance provision and the focus of the 1977 amendments was

<sup>21</sup> See, e.g., 40 C.F.R. 415.62 (1976).



on strengthening EPA's authority to regulate toxic pollutants, primarily through the vehicle of BAT regulations. However, the BPT regulations at issue in *duPont* did contain an FDF variance clause, and those regulations applied to pollutants that Congress, in the 1977 amendments, declared to be toxic.<sup>12</sup> In addition, in February 1977, prior to the enactment of the 1977 amendments, EPA had granted an FDF variance from national BPT regulations to a steam electric generating plant for copper, a toxic pollutant.<sup>13</sup> Since Congress's main concern in 1977 was toxic pollutants, the legislative history would have surely contained some reference to or criticism of *duPont* if Congress had intended to prohibit FDF variances for toxic pollutants. As noted, however, the legislative history is devoid of any such reference.

Finally, respondent has argued (Br. in Opp. 11) that the courts may not infer a nonstatutory exception, such as the FDF variance, where Congress has provided specific statutory exceptions, such as Section 301(c) and (g). This contention is flatly inconsistent with *duPont*, which upheld the nonstatutory FDF variance mechanism even though Section 301(c) was already part of the statute.

3. *EPA's interpretation of Section 301(1) gives that provision its most reasonable meaning and is fully consistent with the purpose of that provision*

a. Apart from its mistaken reading of the legislative history, the only other basis for the court of appeals' decision was its erroneous belief that Section

<sup>12</sup> See, e.g., 40 C.F.R. 415.62 and 415.172 (1976).

<sup>13</sup> Final Decision of the Administrator FDF 76-08, Southern California Edison Co. Huntington Beach Generating Station, NPDES Permit No. CA0001168 (Feb. 22, 1977).

301(c) modifications "serve the same function" as FDF variances (Pet. App. A42). On that premise, the court concluded (*id.* at A43) that "[i]f Congress was willing to prohibit section 301(c) modifications where toxic pollutants are concerned, it is difficult to imagine why Congress would have permitted similar FDF variances for those same pollutants."

The court of appeals' analysis betrays a fundamental misunderstanding of the nature of both FDF variances and Section 301(c) modifications. An FDF variance is substantively the same as an amendment of the regulation establishing the effluent limitation or pretreatment standard. As this Court has written, an FDF variance "is an acknowledgment that the uniform \* \* \* limitation was set without reference to the full range of [factors], to which the Administrator was to refer. Insofar as a [categorical] limitation was determined without consideration of a [factor] fundamentally different from those that were considered by the Administrator, that limitation is incomplete." *EPA v. National Crushed Stone Ass'n*, 449 U.S. at 77-78. In effect, the FDF variance creates an appropriate subcategory for the plant or plants in question, a category that should have been established at the outset had EPA been aware of all the relevant factors and taken them into account. In considering whether an FDF variance will be granted, EPA cannot take into account factors that could not have justified a change in the national regulation, such as the economic plight of the affected plant or plants (40 C.F.R. 403.13(e)(3)) or "the impact of a [d]ischarge on the quality of the POTW's receiving waters" (40 C.F.R. 403.13(e)(4); see also *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323 (9th Cir.), cert. denied, 454 U.S. 1053 (1981)).

A modification under Section 301(c), by contrast, serves an entirely different purpose.<sup>10</sup> A Section 301(c) modification requires a showing that the "modified requirements . . . will represent the maximum use of technology within the economic capability of the owner or operator" (33 U.S.C. 1311(c) (emphasis added)). Thus, a Section 301(c) modification excuses compliance with a valid requirement by a direct discharger. Unlike an FDF variance, such a modification is not in any way an acknowledgement that the effluent limitation was incomplete or deficient. As this Court has already explained (*EPA v. National Crushed Stone Ass'n*, 449 U.S. at 78):

A variance based on economic capability . . . would allow a variance simply because the point source could not afford a compliance cost that is not fundamentally different from those the Administrator has already considered . . . . It would force a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off.

Similarly, a Section 301(g) modification may be obtained by showing that if the modification is granted, BPT requirements will nevertheless be met; additional requirements for other sources will not result; and public water supplies, the environment, and human health will be protected. Like a Section 301(c) modification, a modification under Section 301(g)

<sup>10</sup> Modifications under Section 301(c) and (g) are not available for indirect dischargers. Under the statute, they are only available for direct dischargers.

does not suggest that the direct discharger's effluent limitation was inaccurate or incomplete.<sup>11</sup>

In short, the court of appeals' equation of FDF variances with Section 301(c) and (g) modifications is simply wrong.<sup>12</sup>

b. Once the fundamental difference between an FDF variance and a statutory modification is recognized, the soundness of the EPA's interpretation becomes apparent. While a literalistic reading of Section 301(l) would prevent EPA from ever changing a standard relating to a toxic pollutant—an unreasonable result that Congress could not have intended—EPA's interpretation leaves the Agency free to

<sup>11</sup> By its terms, Section 301(g), which was enacted in 1977 together with Section 301(l), does not permit a "modification" for toxic pollutants. Thus, the primary purpose of Section 301(l) appears to have been to preclude Section 301(c) modifications for toxic pollutants.

<sup>12</sup> In concluding (Pet. App. A42) that Section 301(c) modifications and FDF variances "serve the same function," the court of appeals relied on the following statement in *National Crushed Stone Ass'n*, 449 U.S. at 74:

A § 301(c) variance . . . creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class.

This statement, however, makes no reference whatever to FDF variances from either BPT or BAT standards. The Court was merely pointing out that a Section 301(c) modification results in a standard that is within the economic capability of the discharger. It does not follow, however, as the court of appeals concluded (Pet. App. A42), that this Court viewed Section 301(c) modifications and FDF variances as "serv[ing] the same function." On the contrary, later in *National Crushed Stone Ass'n* (449 U.S. at 77-78), this Court took pains to point out the significant differences between these two measures.

change the categorical standard by amendment or FDF variance, if warranted. But EPA's interpretation also means that compliance with a valid categorical standard for a toxic pollutant may never be excused due to the economic plight of a particular plant or the quality of the receiving waters; elimination of toxic pollutants must take precedence over such considerations. This interpretation is entirely consistent with the 1977 amendments' emphasis on restricting the discharge of toxic pollutants. *Leg. Hist.* 326, 454.

c. Respondent has argued (Br. in Opp. 13) that while EPA may not grant FDF variances for toxic pollutants, EPA may "revise" its limitations and standards for such pollutants through informal rule-making procedures. While contending (Br. in Opp. 11) that FDF variances are "clear[ly]" "modifications" prescribed by Section 301(i), respondent does not explain why the revisions it espouses are any less "modifications."

Respondent has also conceded throughout this litigation that EPA has the flexibility to establish plant-specific requirements by creating tailor-made sub-categories during the national rulemaking process. However, respondent has offered no convincing argument why it is a reasonable construction of the Act to allow the creation of such sub-categories during the initial rulemaking but unreasonable to accord EPA the same flexibility through the FDF variance process in those relatively few cases in which a discharger can demonstrate that EPA has not adequately considered some factor during the rulemaking process.<sup>10</sup>

<sup>10</sup> Respondent has offered various arguments on this point over the course of this litigation, but none is well founded. In the court below, respondent contended that the FDF variance process circumvents the public notice and comment require-

Moreover, since respondent agrees that EPA may adopt rules creating special categories for plants with fundamentally different factors and that EPA may amend its rules setting requirements for toxic pollutants, respondent would appear to concede by implication that EPA, after issuing categorical requirements relating to toxic pollutants, may revise those requirements to take into account the fundamentally different factors affecting a particular plant or group of plants.<sup>11</sup> Such an amendment, of course, would be

amendments attendant to national rulemakings. Transcript of Oral Argument in Court of Appeals at 249. However, the FDF variance process clearly provides for public notice and comment. 40 C.F.R. 403.13(j). In opposing the petitions for certiorari, respondent argued that the FDF variance procedure entails several layers of review and public comment and is thus "extraordinarily slow of resolution" (Br. in Opp. 12). However, the review procedures about which respondent complains help to ensure that FDF variances will only be granted in the relatively few appropriate cases. Respondent's claim (Br. in Opp. 14) that FDF variance applications permit companies to delay compliance with the Act is inconsistent with respondent's assertion (Br. in Opp. 7) that "[f]ew companies are interested in the FDF variance." Finally, respondent has argued that Section 307(b)(2) of the Act, 33 U.S.C. ~~1271(b)(2)~~ 1271(b)(2), contains the exclusive statutory mechanism for correcting the national pretreatment standards. That section directs EPA, "from time to time," to revise the standards "as control technology, processes, operating methods, or other alternatives change." Clearly, however, this provision is intended to reflect periodic changes in the industry, not to adjust the national standards in light of presenting factors not considered by EPA at the time of promulgation.

<sup>11</sup> Following the decision in this case, EPA announced that it would entertain petitions for amended rulemaking by certain indirect dischargers who were previously eligible for FDF variances. See 66 Fed. Reg. 32996 (1991). EPA explained (*ibid.*) that in such cases "it may be appropriate to



relatively indistinguishable from an FDF variance. Thus respondent's disagreement with the Agency appears to concern, not the result achieved when an FDF variance is granted for a toxic pollutant, but the procedure employed. There is, however, no evidence that Section 301(i) was concerned with such procedural questions. Furthermore, respondent has never provided a cogent or consistent explanation of why the rulemaking procedure it favors is preferable. Respondent has argued, alternatively, that the FDF variance procedure is too summary and too slow. See note 24, *supra*. At all events, if deference to EPA's construction of the Clean Water Act means anything, it surely must mean that the Agency is free to choose between these two procedures. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

4. FDF variances are granted infrequently<sup>26</sup> and present no threat to the achievement of the Clean Water Act's goal of improving the quality of the nation's waters through national regulation.<sup>27</sup> The

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more specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate."

<sup>26</sup> As respondent itself acknowledges (Br. in Opp. 12), by 1977 only 30 of 4,000 major industrial dischargers covered by BPT limits had applied for FDF variances, and only two variances had been granted. As of today, only four variances have been granted to direct dischargers, and none has yet been granted to an indirect discharger. The Agency estimates that approximately 40 FDF variance requests have been filed by indirect dischargers and are pending.

<sup>27</sup> See *Crown Hingham Pulp Co. v. Costle*, 641 F.2d 323 (9th Cir.), cert. denied, 434 U.S. 1052 (1981) (upholding EPA's veto of FDF variances from BPT requirements that had been granted by the State based upon lack of harm to receiving waters).

small number of variances obtained, however, does not mean that such variances are unimportant or unnecessary. There are at least 60,000 existing indirect dischargers potentially subject to national pretreatment standards. Within the past several years, EPA has promulgated BAT-level pretreatment standards for 17 industrial categories, and it is now moving rapidly toward completion of BAT-level requirements for an additional seven categories within the next year. All of these regulations were or are being developed under the very rationale that this Court found persuasive in *duPont*, i.e., that it is sound administrative practice to promulgate categorical regulations for existing dischargers as soon as possible with an FDF variance available as a safety valve. In light of the stringent deadlines that have been imposed on the Agency, EPA has found it necessary to base the national standards on the more typical plants and to focus on unique situations through the FDF variance process. In the past, the FDF variance mechanism has helped to protect the national standards against challenges by plants with unique circumstances.<sup>28</sup> If FDF variances for toxic pollutants may not be granted, then existing regulations may be more vulnerable in the future. And issuance of standards now under development by the Agency may be delayed if EPA must account for all

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<sup>28</sup> See, e.g., *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979) (rejecting challenge to BPT effluent limitations guidelines for ore mining direct dischargers because FDF variance procedure was available to address unique plant); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1040-1041 (D.C. Cir. 1978) (finding existence of FDF variance "crucial" to affirmation of BPT regulations for direct dischargers); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1061 (1975), modified, 560 F.2d 569 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978).



unique plant-specific factors in developing these standards.

In sum, the FDF variance provision is a longstanding and integral feature of the EPA's categorical rulemaking activities for direct and indirect dischargers. It provides an important, albeit limited, safety valve for atypical plants that are improperly regulated by the initial rule. There is no sound basis for disturbing EPA's construction of the Act which allows such variances to be granted for all pollutants. Upsetting EPA's interpretation at this late juncture could inject considerable uncertainty into the implementation of the Act and could thwart the achievement of its goals.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

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JULY 1984

**AMICUS CURIAE**

**BRIEF**

JUL 6 1984

Nos. 83-1913 and 83-1973

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,  
*Petitioners,*  
v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,  
*Respondents.*  
U.S. ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*  
v.  
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE OF THE  
CHAMBER OF COMMERCE OF THE UNITED STATES

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Is The  
**Supreme Court of the United States**  
 OCTOBER TERM, 1968

**0-9    A-Z    0000    0001    0002**

CENTRAL MANUFACTURING ASSOCIATION, et al.,  
Petitioners.

National Resources Defense Council, Inc., et al.,  
Respondents.

U.S. Department of Justice, Bureau of Prisons

National Resources Inventory Council, Inc., et al.,  
Appellants.

The West of Connecticut to the United States  
Court of Appeals for the Third Circuit.

**DIVISION OF THE CHAMBER OF COMMERCE OF THE  
UNITED STATES FOR LEAVE TO FILE  
BRIEF AMSTERDAM**

The Chamber of Commerce of the United States urges for leave to file the attached brief and/or revise pursuant to Supreme Court Rule 34.1. Petitioners, Chemical Manufacturers Association ("CMA") and the Environmental Protection Agency ("EPA" or "Agency") have consented to the filing of this brief. Their consent letters have been filed with the Clerk of this Court. Efforts to obtain the



movement of interest for the Respondents, National Resources Defense Council, Inc. ("NRDC"), were unsuccessful, thus necessitating this motion.

The Chamber of Commerce of the United States ("Chamber") is the largest association of business and professional organizations in the United States. Chamber membership exceeds 200,000 business firms and individuals, and includes over 100,000 corporations, partnerships and proprietorships and over 3,000 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in litigation of issues of national concern to the American business community and, in fact, filed an amicus brief in support of the Petition for Certiorari in this proceeding.<sup>1</sup>

The issue before the Court in this case is whether 301 (b) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311 (b), prohibits the Environmental Protection Agency ("EPA") from granting "fundamentally different factors" variances ("FDF variances") for toxic pollutants from national pretreatment standards. This issue involves a critical question of statutory construction which goes to the very heart of how EPA administers the Clean Water Act.

The Chamber believes the Third Circuit's decision to curtail down the use of FDF variances for toxic pollutants is unduly broad and eliminates the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) and *EPA*

*v. National Crushed Stone Association*, 449 U.S. 53 (1980). Moreover, NRDC has indicated that it intends to challenge FDF variances from effluent guidelines on the same grounds as argued below in a lawsuit pending before the U.S. Court of Appeals for the District of Columbia Circuit. *NRDC v. EPA*, No. 80-1607. Thus, unless reversed by this Court, the Third Circuit decision will be used to undermine the way EPA develops all industry-wide regulations under the Clean Water Act, not just the pretreatment standards challenged below.

EPA develops effluent guidelines and pretreatment standards on an industry-wide basis by combining categorical standards with the opportunity for individual discharges within each category to demonstrate factors "fundamentally different" from those EPA considered when developing the industry-wide regulations. This practice benefits the Agency, the public and the regulated community. By focusing regulation development on typical facilities within a single industrial category and deferring consideration of atypical ones to subsequent individual proceedings, EPA saves time, reduces costs and ensures that similar facilities will be subject to similar treatment. Fair and equitable treatment in setting industry-wide regulations is important to all industrial dischargers, especially to those individual dischargers that EPA overlooked during the national rulemaking process.

The continued availability of FDF variances from effluent guidelines and pretreatment standards is of particular importance to the Chamber's member companies which represent a cross-section of the 60,000 individual firms subject to both sets of industry-wide regulations. These firms include coal companies, iron and steel manufacturers and petroleum refineries. Given the broad impact of the Third Circuit decision on American companies and the significance of this issue to the industrial com-

<sup>1</sup> See, e.g., *CMA v. NRDC*, cert. granted, 52 U.S.L.W. 3791 (U.S. Sup. Ct. 1984) (No. 83-1013); *TWA v. Thurston*, cert. granted, 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-097); *Bowen v. U.S. Postal Service*, — U.S. —, 74 L. Ed. 2d 602 (1983).

munity as a whole, the Chamber respectfully seeks leave to file the attached brief.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

Nos. 83-1013 and 83-1373

CHEMICAL MANUFACTURERS ASSOCIATION, et al.,  
 Petitioners,  
 v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
 Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
 Petitioner,  
 v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,  
 Respondents.

On Writ of Certiorari to the United States  
 Court of Appeals for the Third Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE  
 UNITED STATES AS AMICUS CURIAE

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion For Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

## INTRODUCTION

This case arises out of challenges to the Environmental Protection Agency's ("EPA" or "Agency") regulations governing the establishment of "fundamentally different factors" ("FDF") variances from national pretreatment standards under the Clean Water Act, 33 U.S.C. § 1351 (1976).<sup>1</sup> EPA promulgates pretreatment standards on an industry-wide basis under § 307(b) of the Clean Water Act, 33 U.S.C. 1317(b), to control the level of wastewater industrial facilities ("indirect dischargers") may discharge into a publicly-owned treatment plant.

EPA develops pretreatment standards according to specified statutory factors required by § 304(b) of the Act, 33 U.S.C. § 1314(b). These factors include the age of the equipment and facilities involved, the process employed, the engineering aspects of pollution control techniques, energy impacts and the costs of required effluent reductions but not the ability to pay that cost. Under the EPA regulations at issue in this case, any indirect discharger could demonstrate factors "fundamentally different" from these factors, and receive an FDF variance from the industry-wide standards. 40 C.F.R. § 403.12 (1984).

In the proceeding below, the Natural Resources Defense Council, Inc. ("NRDC") challenged the pretreatment FDF variance regulation on two grounds: (1) that EPA has no authority to issue FDF variances; and (2) that § 301(f) of the Clean Water Act expressly prohibits FDF variances for toxic pollutants. Section 301

<sup>1</sup> The Chamber of Commerce of the United States does not wish to burden this Court with a detailed restatement of the facts of the proceedings below. Each has been well-stated by the Petitioners, Chemical Manufacturers Association. Accordingly, the Chamber respectfully refers this Court to their Statement of the Case.

(f) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under Section 307(a)(1) of this Act." 33 U.S.C. § 1311(f).

The U.S. Court of Appeals for the Third Circuit did not rule on the question of EPA's inherent authority to issue FDF variances. Instead, it found the § 301(f) argument dispositive, and held that "FDF variances from toxic pollutants were forbidden by § 301(f) of the Act." (A-43). The Third Circuit remanded the pretreatment regulations to EPA which revised them "to make clear that the pretreatment FDF variance provision is not available for toxic pollutants." 49 Fed. Reg. 5131, 5132 (1984).

Prior to the decision below, FDF variances were available from both pretreatment standards and from their statutory counterparts, effluent guidelines,<sup>2</sup> without regard to levels of pollution control technology. EPA routinely included a FDF variance clause in each of the first-round, categorical "best practical control technology currently available" ("BPT") regulations which direct dischargers had to achieve by July 1, 1972. This FDF variance provision became part of the generic permit regulations on June 7, 1979. 40 C.F.R. § 125.30 (1982). It applied equally to the BPT and to the "best available technology economically achievable" ("BAT") regulations which direct dischargers must meet by July 1, 1984.

EPA added a similar FDF variance provision to the General Pretreatment Regulations on June 26, 1979.<sup>3</sup> 43 Fed. Reg. 27726-73. The pretreatment FDF variance,

<sup>2</sup> EPA promulgates effluent guidelines under § 306(b) of the Clean Water Act, 33 U.S.C. § 1311(b), to control the level of wastewater an industrial facility ("direct discharger") may discharge directly into the waters of the United States.

<sup>3</sup> Following further rulemaking, EPA revised these regulations on January 28, 1981. 46 Fed. Reg. 6454-65.



like its direct discharger counterpart, did not distinguish between levels of control technology until revised by EPA on February 10, 1984, in response to the decision of the Third Circuit below. Section 403.13 now provides that FDF variances are "not available for any toxic pollutant controlled in a categorical Pretreatment Standard." 49 *Fed. Reg.* 5132 (1984).

#### SUMMARY OF ARGUMENT

The Third Circuit held in the case below that § 301(l) of the Clean Water Act expressly prohibits FDF variances from industry-wide toxic pollutant standards. Accordingly, the court found it unnecessary to reach the issue of EPA's inherent authority to issue FDF variances in the first place.

That holding ignores two prior decisions of this Court, dismisser relevant legislative history and undermines a long-standing EPA practice for regulating atypical industrial dischargers which has been relied upon for years by EPA, the regulated community and the lower courts.

EPA's authority to issue FDF variances was established by this Court in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). In *duPont*, this Court held that EPA may establish BPT effluent limitations by industry-wide regulations "so long as some allowance is made for variances in individual plants." *Id.* at 128. This Court also stated that "nothing . . . in the Act . . . suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1984 [BAT] deadlines", thereby suggesting that FDF variances are as necessary for BAT as for BPT. *Id.* at 127. Nor did Congress, which was aware of this decision and of EPA's practice of allowing FDF variances, intend to overrule this Court's decision in *duPont* when it enacted § 301(l) in 1977. In fact, this Court reaffirmed the importance of FDF variances in setting industry-wide regulations in *EPA v. National Crushed Stone Asso-*

*ciation*, 449 U.S. 53 (1980), by describing FDF variances as a "necessary aspect" of regulating classes and categories of industrial point sources. *Id.* at 72.

Nevertheless, the Third Circuit below dismissed these clear indications of EPA authority to issue FDF variances from toxic pollutant standards, and broadly interpreted the scope of § 301(l) of the Act despite clear legislative history to the contrary. By holding that the Clean Water Act forbids FDF variances for toxic pollutants, the Third Circuit ignored explicit congressional intent to limit only EPA's authority to waive toxic pollutant standards under § 301(c) and (g) of the Act based on individual economic capabilities or water quality considerations but not on § 304(b) factors. 33 U.S.C. §§ 1311(c) and (g). Congress did not intend to limit EPA's authority to issue FDF variances because they do not relieve a discharger from complying with a statutory standard, but rather subject it to a more complete standard.

The Third Circuit's sweeping misinterpretation of § 301(l) goes to the very heart of how EPA develops industry-wide regulations for *all* industrial dischargers, not just those subject to pretreatment standards. The Third Circuit decision not only invalidates the use of FDF variances from pretreatment standards, but also jeopardizes the use of FDF variances generally. The decision below threatens EPA's entire regulatory scheme and, unless reversed by this Court, will eliminate the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act.

## ARGUMENT

### I. THE DECISION BELOW UNDERMINES A LONG-STANDING EPA PRACTICE FOR REGULATING ATYPICAL INDUSTRIAL DISCHARGERS UNDER THE CLEAN WATER ACT.

Section 301(l) of the Clean Water Act provides that the Administrator may not modify the requirements of § 301 for toxic pollutants. 33 U.S.C. § 1301(l). In the decision below, the Third Circuit broadly interpreted § 301(l) and held that "FDF variances for toxic pollutant discharges are forbidden by the Act." (A-43).

The Third Circuit's broad interpretation of § 301(l) undermines a long-standing EPA practice for regulating all industrial dischargers under the Clean Water Act. NRDC has notified the U.S. Court of Appeals for D.C. Circuit that it intends to challenge the FDF variance provision for direct dischargers on the same grounds raised in the Third Circuit for pretreatment. Unless reversed by this Court, the Third Circuit's sweeping interpretation of § 301(l) will be used to eviscerate EPA's reasonable construction of the statutory scheme it is entrusted to administer. See *Chevron U.S.A. v. NRDC*, No. 82-1005 (June 25, 1984).

EPA develops all industry-wide regulations, including pretreatment standards, by combining categorical standards with the opportunity for individual dischargers within each category to apply for a FDF variance. The availability of FDF variances to fundamentally different dischargers is an integral part of developing industry-wide regulations and has become an established Agency practice for regulating both direct and indirect dischargers. In fact, this Court has upheld the role of FDF variances in setting effluent guidelines on two separate occasions. *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) and *EPA v. National Crushed Stone Association*, 449 U.S. 53 (1980). Lower federal courts have hailed

the FDF variance as "an administrative safety valve" which "permits a more rigorous adherence to an effective regulation." *NRDC v. EPA*, 537 F.2d 642, 647 (2d Cir. 1976) (quoting *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1979)).

FDF variances are available to both direct and indirect dischargers and therefore are of vital concern to virtually all industrial dischargers, not just those subject to the pretreatment regulations challenged below. The FDF variance process allows EPA to focus its rule-making efforts on more typical plants in an industrial category. Deferring consideration of atypical plants to a subsequent individual FDF variance proceeding ensures that similar facilities will be treated similarly. It also avoids challenges to an entire set of industry regulations on the grounds that they are not fully representative of industry as a whole.

The FDF variance process also helps EPA expedite its enormously complex task of developing effluent guidelines and pretreatment standards for the 60,000 industrial dischargers regulated under the Clean Water Act. "The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required EPA to restrict itself in the regulation promulgation process to a representative sampling of plants." *NRDC*, 537 F.2d at 647.

By coupling the promulgation of national standards with the opportunity to apply for a FDF variance, EPA can regulate dischargers by industrial category rather than individually. Moreover, without a FDF variance provision, there is no guarantee that EPA could effectively remedy defects resulting from the application of "ill-suited" regulations to "unsampled individual plants." *Id.*

FDF variances also helps both sets of industry-wide regulations survive legal challenges<sup>4</sup> and have been used as a bargaining device by the Agency to convince industry not to challenge regulations.<sup>5</sup> Without a variance clause to address atypical situations, future industry-wide regulations also may be the subject of protracted litigation. The Chamber therefore urges this Court to reverse the Third Circuit decision to prohibit FDF variances for toxic pollutants so that EPA's long-standing approach for regulating industrial discharges under the Clean Water Act may continue without the constant threat of impending litigation.

**II. THE DECISION BELOW IGNORES TWO PRIOR DECISIONS OF THIS COURT WHICH REQUIRE FDF VARIANCES WHEN SETTING INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT.**

The Third Circuit decision to strike down the use of FDF variances for toxic pollutants is inconsistent with this Court's prior interpretations of the Clean Water Act. In *duPont*, this Court approved of EPA's regulatory scheme of allowing FDF variances from industry-wide regulations. At issue was whether EPA could set effluent limitations by regulations for industry categories even though the statute authorized BPT limits for individual point sources and BAT limits for classes and categories of point sources. This Court held that "the CWA authorizes the 1977 BPT limitations as well as the [1984] BAT limitations to be set by regulations, so long as some allowance is made for variations in individual

<sup>4</sup> *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979). See *Weyerhaeuser Co. v. Cottle*, 590 F.2d 1011 (1978).

<sup>5</sup> See 48 Fed. Reg. 40945-6 (1983) (Proposed regulations to implement settlement agreement resolving all legal challenges to effluent guidelines and pretreatment standards for the iron and steel point source category).

plants, as EPA has done by including a variance clause in its 1977 limitations." *duPont* at 128 (emphasis added). Subsequent decisions have interpreted *duPont* as requiring FDF variances. *Weyerhaeuser*, 590 F.2d at 1032 ("recently the Supreme Court held that . . . a variance provision is legally required . . ."); *NRDC*, 537 F.2d at 647 (1976) ("without variance flexibility, the program might well founder on the rocks of illegality;").

In *National Crushed Stone Ass'n*, this Court reaffirmed the importance of FDF variances to the development of industry-wide regulations under the Clean Water Act. There the Court described FDF variances as a "necessary aspect" of applying effluent limitations by regulations to classes and categories of point sources. *Id.* at 72. The Court also noted that industry-wide regulations would be defective without FDF variances:

If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the variance is an acknowledgment that the uniform BPT limitation was set without references to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.

*Id.* at 77-78.

Although the FDF variances referred to in both *duPont* and *National Crushed Stone Ass'n* were from BPT effluent limitations, *duPont* makes clear that nothing in the CWA "suggests any radical difference in the mechanism used to impose limitations for [BPT] and [BAT]." *Id.* at 127. Moreover, the BPT standards at issue in *duPont* contained a FDF variance clause and regulated toxic pollutants.



Nor is there any radical difference in the approach EPA uses to develop effluent limitations and pretreatment standards. EPA develops pretreatment standards at the same time as effluent guidelines, according to the same factors required by statute for developing effluent guidelines, and at levels of technology equivalent to BPT and BAT. This approach for implementing the pretreatment program was agreed to by NRDC in the consent decree with EPA which Congress later endorsed by incorporating it by reference in the 1977 Amendments to the Clean Water Act.<sup>6</sup> This approach has been followed by EPA and relied upon by the regulated community since 1977. *EDF v. Costle*, 636 F.2d 1229, 1235 (D.C. Cir. 1980).

FDF variances from pretreatment standards serve the same function as FDF variances from effluent guidelines, and are as essential to the development of industry-wide pretreatment standards as they are to effluent guidelines. The Chamber respectfully submits that the rationale of *duPont* and *National Crushed Stone Ass'n* should therefore extend to pretreatment standards as well. Anytime EPA sets industry-wide regulations, allowances also must be made for variations in individual plants, as EPA did by including FDF variances from industry-wide pretreatment regulations.

### III. THE DECISION BELOW DISMISSES RELEVANT LEGISLATIVE HISTORY AND IGNORES CONGRESSIONAL INTENT TO LIMIT THE APPLICABILITY OF SECTION 301(l) OF THE CLEAN WATER ACT.

Section 301(l) of the CWA provides that "the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on

<sup>6</sup> *NRDC v. Train*, 8 E.R.C. 2120 (D.D.C. 1976), modified sub. nom. *NRDC v. Costle*, 12 E.R.C. 1813 (D.D.C. 1979), modified sub. nom. *NRDC v. Gorsuch* (D.D.C. Oct. 26, 1982) (hereinafter referred to as the "NRDC Consent Decree.")

the toxic pollutant list under section 307(a)(1) of this Act."<sup>7</sup> In the decision below, the Third Circuit broadly interpreted § 301(l) to prohibit both FDF variances from toxic pollutants and waivers of BAT and pretreatment obligations authorized by §§ 301(c) and (g) of the Act. 33 U.S.C. § 1311(c) and (g).

The Chamber believes that this interpretation of § 301(l) is inconsistent with the legislative history of the Clean Water Act which demonstrates congressional intent to limit the scope of § 301(l) to statutory modifications under §§ 301(c) and (g) of the Act. Consequently, we urge this Court to adopt the interpretation of § 301(l) presented by EPA here and upheld by the Fourth Circuit in *Appalachian Power Company v. Train*, 620 F.2d 1040 (1980).

In *Appalachian Power*, the Fourth Circuit squarely addressed the same issue and arguments presented below,<sup>8</sup> but held that § 301(l) did not apply to FDF variances for toxic pollutants from BPT limitations. The Fourth Circuit accepted EPA's arguments that § 301(l) applies only to §§ 301(c) and (g), and that a FDF variance does not relieve a discharger from complying with § 301, but rather subjects it to a more complete § 301 standard by using data that was not available during the national rulemaking process.<sup>9</sup> *Id.* at 1047.

<sup>7</sup> This list was developed by EPA and NRDC as part of the consent decree cited above.

<sup>8</sup> Both the Third and Fourth Circuits frame the issue in general terms, without regard to levels of technology. The Fourth Circuit described the issue before it as whether § 301(l) "prohibits EPA from modifying any of § 301(l) . . . , including BPT limitations, for toxic pollutants." 620 F.2d at 1042 (emphasis added). Similarly, the Third Circuit states the issue below as whether "variances for toxic pollutants are forbidden by Section 301(l) of the Act." (A-40).

<sup>9</sup> That, in fact, is exactly how this Court described FDF variances in *National Crushed Stone*. See text accompanying p. 9 above.



The Fourth Circuit based its holding on the structure of the Clean Water Act, its legislative history, and the general principle of deferring to an agency's construction of the statute it administers. *Id.* at 1048. Observing that "the best that can be said for § 301(l) is that it is not clear," the Fourth Circuit "(gave) weight to the construction of the administering agency" and held that § 301(l) does not prohibit FDF variances for toxic pollutant standards. *Id.* at 1048. *Accord, Chevron U.S.A. v. NRDC*, No. 82-1005 (June 25, 1984). The Chamber urges this Court to adopt the Fourth Circuit's rationale here.

In the decision below, the Third Circuit not only "disagrees" with the Fourth Circuit's interpretation of § 301(l), but it also dismisses explicit legislative history which demonstrates Congress' primary concern for prohibiting modifications under § 301(c) and (g). (A-42). In so doing, the Third Circuit cavalierly ignores clear congressional intent.

The legislative history of § 301(l) should not be dismissed so lightly. Congress was aware of this Court's decision in *duPont* and of EPA's practice of allowing FDF variances when it adopted § 301(l). If Congress sought to overrule *duPont* it would have done so explicitly. Instead, Congressman Roberts, House leader of the 1977 CWA amendments, described the objective of § 301(l) as follows:

Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modifications of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

*A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 328-29 (1978).

The legislative history of the Clean Water Act does not support the Third Circuit's assumption that Congress intended to override or expressly limit FDF variances for toxic pollutant standards when it enacted § 301(l) of the Act. On the contrary, the legislative history demonstrates congressional approval of both the FDF variance process and EPA's interpretation that § 301(l) of the Act does not prohibit FDF variances for toxic pollutant standards.

### CONCLUSION

For the foregoing reasons, the Chamber of Commerce respectfully urges this Court to reverse the decision below and to reaffirm EPA's inherent authority to issue FDF variances for toxic pollutant standards as previously established by this Court.

Respectfully submitted,

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**AMICUS CURIAE**

**BRIEF**

No. 83-1013

No. 83-1373

Supreme Court, U.S.  
FILED

AUG 20 1984

ALEXANDER L. STIVAS  
CLERK

IN THE

# Supreme Court of the United States

October Term, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, et al.  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

## BRIEF FOR STATE OF NEW YORK AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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**Question Presented for Review.**

Whether the Court of Appeals for the Third Circuit correctly held that Section 301(1) of the Clean Water Act, 33 U.S.C. § 1311(1) prohibits the United States Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to indirect dischargers.



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Nos. 83-1013 and 83-1373

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

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CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,

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ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

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**Brief for State of New York *Amicus Curiae.***

### **Opinion Below.**

The opinion of the Court of Appeals for the Third Circuit is reported at 719 F.2d 624.

### **Jurisdiction.**

The judgment of the Court of Appeals was entered on September 20, 1983. The petition for a writ of certiorari in No. 83-1013 was filed on December 19, 1983. By order dated December 12, 1983, Justice Brennan extended the time to file a petition for a writ of certiorari in No. 83-1373 until February 17, 1984, and the petition was filed on that date. The petitions were granted, and the cases were consolidated on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **Statutes and Regulations Involved.**

This case involves technology-based "pretreatment standards" under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982). Section 301(b) of the Act, 33 U.S.C. § 1311(b) (1982), describes various effluent limitations and standards that dischargers of pollutants are required to achieve. The factors that the Environmental Protection Agency Administrator must consider in establishing effluent limitations and standards are set forth in § 304(b) of the Act, 33 U.S.C. § 1314(b) (1982). Sections 301(c) and (g) of the Act, 33 U.S.C. § 1311(c) and (g) (1982), authorize modifications of some of the § 301 limitations and standards. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1982), provides that the Administrator may not modify the requirements of § 301 for toxic pollutants.

The EPA regulation at issue in this case governing the establishment of "fundamentally different factors" ("FDF") variances is codified at 40 C.F.R. § 403.13 (1983), and in 1984 was amended to reflect the decision of the court below (49 F.R. 5132, Feb. 10, 1984).

### **Interest of Amicus Curiae.**

When the Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, it provided for a national scheme to improve the nation's water quality. While the States remain free under the Act to promulgate stricter standards should they choose to do so, they remain dependent upon the United States Environmental Protection Agency ("EPA") to promulgate baseline national effluent limitations. When EPA creates an unauthorized variance procedure, Congress' intent that there be baseline uniformity in regulating discharges is denied. This frustrates the water quality goals of the Act, does violence to the federal-State partnership envisioned by Congress, creates economic inequities by giving some plants economic advantages over others, and carried to the extreme, promotes interstate conflict.

New York, like 30 other States, is not authorized by EPA to administer the fundamentally different factor ("FDF") variance EPA created for indirect dischargers of toxic pollutants. In addition, under EPA's regulations, New York and 30 other States have no formal role when a discharger requests a variance from EPA; they may not even be aware of the request. EPA's never-ending decision-making process on FDF variances for toxic pollutants operates as a disincentive to the timely installation of pollution control devices because plants applying for the variance defer such expenditures in the hope they may qualify for a variance and thus cut costs.



Such inequities, the State of New York suggests, were not only not contemplated by Congress in enacting and amending the Clean Water Act, but are contrary to Congress' intentions.

This brief is therefore submitted in support of the position urged by the respondent, the Natural Resources Defense Council, Inc. seeking affirmance of the decision below of the Third Circuit Court of Appeals.

#### **Statement of the Case.**

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, requires the United States Environmental Protection Agency to regulate two types of industrial dischargers: (1) "direct" dischargers, who discharge their wastewater directly into navigable waters, and (2) "indirect" dischargers, who discharge into municipally operated, publicly-owned treatment works, which in turn discharge their collective wastewaters into navigable waters. For both types of dischargers, EPA conducted rulemaking proceedings and promulgated national technology-based requirements applicable to categories of dischargers (e.g., metal finishing, electroplating). In each rulemaking proceeding, EPA inventoried industrial plants to gather information about the types and quantities of pollutants in a typical plant's wastewater and the costs and effectiveness of various wastewater treatment technologies prior to promulgating regulations.

EPA also, however, included a provision allowing an atypical plant to obtain a variance from the limits in a categorical standard where the plant made a satisfactory showing of factors "fundamentally different" from those considered by EPA in promulgating the regulations. This "fundamentally different factor" variance is theoretically

available to lower as well as raise a plant's limits (although there are no indications in the record of requests to lower the limits) and is available not only upon the request of a plant, but of "any interested person", including EPA (40 C.F.R. § 403.13(b)).

The variance mechanism is somewhat cumbersome. New York and 30 other States are not authorized by EPA to grant or deny requests for variances from the pretreatment standards. Variance requests must be filed with the EPA, and the public is invited to comment (40 C.F.R. § 403.13(g), (j)). The EPA Enforcement Division Director then decides whether to grant or deny the variance (40 C.F.R. 403.13(1)). After his decision is issued, any interested person may petition the EPA Regional Administrator for a hearing within 30 days of the EPA Enforcement Division Director's decision (40 C.F.R. § 403.13(m)(1)), and if the petition is denied, the denial may be appealed to the EPA Administrator himself (40 C.F.R. § 403.13(m)(2)).

Experience has shown that once a plant files for an FDF variance, compliance with the Clean Water Act is deferred to some uncertain future date. Some applications, still undecided, date from 1976. Not surprisingly, while this process is going on, plants are unwilling to make substantial capital investments in expensive pollution control devices because there exists the hope that a variance will be issued and that the expenditure may not be necessary.

#### **Summary of Argument.**

By its express terms, Section 301(1) of the Clean Water Act prohibits the issuance of a variance for indirect dischargers of toxic pollutants. It is reasonable to assume that Congress, which expressly included several provisions authorizing variances relating to conventional, *i.e.*, non-



toxic pollutants in other sections of the Clean Water Act, enacted the prohibition barring variances for toxic pollutants in Section 301(1) because it chose to treat toxic pollutants differently.

EPA's argument that the ban against variances applies to some variances but not to the FDF variances at issue is inconsistent with the broad language of the ban and Congress' historic treatment of toxic pollutants under the Clean Water Act.

EPA's argument that the ban must be read flexibly in its favor or, conversely, rigidly to prohibit any amendment or revision of effluent limitations or standards in the absence of rule-making must be rejected because a reasonable construction which accords with the statute's express terms and intent is available.

#### ARGUMENT.

**Section 301(1) of the Clean Water Act prohibits the issuance of FDF variances for indirect dischargers of toxic pollutants.**

Section 301(1) of the Clean Water Act was enacted by Congress in 1977 and provides:

The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this title.

This is in stark contrast to Sections 301(c) and (g) of the Clean Water Act which expressly authorize variances:

(c) The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

• • •

(g) (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b) (2) (A) of this section with respect to the discharge of any pollutant (*other than* pollutants identified pursuant to section 304(a) (4) of this title, *toxic pollutants* subject to section 307(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b) (1) (A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection. (Emphasis added).

Had Congress wished to authorize a variance from toxic pollutants for indirect dischargers, it certainly had the opportunity. Instead, it chose to prohibit such variances and plainly said so. The Third Circuit had no difficulty with this rationale. As that Court pointed out, Congress has always treated toxic pollutants specially under the Act (719 F.2d at 645). Indeed, the ban against variances for toxic pollutants is the only express ban against variances in the entire Act.

The reasoning this Court applied in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) is equally appropriate here:

*In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and "maximum feasible control of new sources." 430 U.S. at 138 (emphasis added).*

Congress' intention to insure national uniformity is counter-manded by creation of an FDF variance.

EPA's argument that the ban against variances for toxic pollutants applies not to FDF variances but only to those authorized by Sections 301(c) and (g)—based on economics or the high quality of waters receiving the discharge—is belied by the broad terms of the prohibition in Section 301(l). It is nothing more than an argument of convenience for the administrators and does not reflect Congress' intention—or most obviously—Congress' words.

EPA's argument that a "literalistic" reading of the ban would mean that EPA could never revise effluent limitations and pretreatment standards for toxic pollutants even if it discovered errors in its analysis goes too far. The ban does not prohibit EPA from amending or revising nationally-uniform limitations or standards within a rule-making context; such amendments or revisions would still provide for national uniformity, rather than for case-by-case exceptions administered on a regional rather than national basis, some by mere default for years, as the FDF variance procedure does now.

New York strongly disagrees with EPA's argument that a rule-making proceeding and the FDF variance procedure would achieve the same substantive result. Rule-making achieves national uniformity in accordance with the goals of the Clean Water Act, while individual plant-by-plant determinations made by regional, not national, EPA personnel under the FDF variance procedure do not.

It is significant that Senator Edmund S. Muskie, acknowledged by this Court in *du Pont* as "perhaps the Act's primary author" (430 U.S. at 129) used the terms "modification" and "variance" interchangeably during the Senate floor debate, on the 1977 amendments (A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. [1978]). His understanding of the meaning of the term "modification", and his explanation to his colleagues, who presumably relied upon it, is clear: modification means variance, not rule-making. And as this Court also stated in *du Pont*, Senator Muskie also "emphasized the importance of uniformity in setting § 301 limitations. He explained that this goal of uniformity required that EPA focus on classes or categories of sources in formulating effluent limitations" (430 U.S. at 129). EPA's FDF variances which create plant-by-plant rather than categorical exceptions are inconsistent with Senator Muskie's representations. Senator Muskie's statements, given his unique role in obtaining passage of the legislative provisions at issue here, are entitled to significant weight. Thus, EPA's argument that a literal interpretation is required should be rejected because it would lead to an unreasonable result, and that would be inconsistent with elementary principles of statutory construction.

## CONCLUSION.

**For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed.**

Dated: August 20, 1984

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# **RESPONDENT'S BRIEF**



8 7  
Nos. 83-1013, 83-1373

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**FILED**  
AUG 20 1984

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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent;*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent.*

On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit

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**QUESTION PRESENTED**

Whether the Third Circuit correctly held that Section 301(f) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(f), prohibits the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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**No. 83-1013**

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent;*

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**No. 83-1373**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
*Respondent.*

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**On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit**

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**BRIEF FOR RESPONDENT**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1-A96)<sup>1</sup> is reported at 719 F.2d 624.

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<sup>1</sup> "Pet. App." refers to the appendix to the petition in No. 83-1013. "Br. in Opp. App." refers to the appendix to the brief in opposition to the petitions.

## STATUTES AND REGULATION INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are set forth in Pet. App. A116-A121 or the Appendix to this brief. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at Pet. App. A122-A127.

## STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, directs EPA to control two types of industrial polluters: (1) "direct" dischargers, which dump their waste water directly into navigable waters, and (2) "indirect" dischargers, which dump their waste water into municipal sewage treatment plants which, in turn, discharge to navigable waters.

When the law was first enacted, Congress required direct dischargers to meet two progressively more stringent technology-based requirements: "best practicable control technology currently available" (BPT) by July 1, 1977, and "best available technology economically achievable" (BAT) by July 1, 1983 (later amended to July 1, 1984). 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (b)(2)(A) and (C). Indirect dischargers had no more than three years from the date of promulgation to meet "pretreatment standards" designed to prevent discharges of pollutants which harmed the environment or the sewage treatment plant. 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (2)(A) and 1317(b). Pretreatment standards, too, were technology-based.<sup>2</sup>

BPT, BAT, and pretreatment were each integral to the overall scheme to clean up the nation's waters, but the pretreatment standards were especially important. Because municipal sewage plants are ordinarily not designed to treat industrial waste water, the pretreatment standards served a dual function. Like BPT and BAT limits, they prevented untreated or inadequately treated industrial wastes from en-

<sup>2</sup> The Act did not initially tell EPA how to set pretreatment standards. EPA adopted a technology-based approach to pretreatment in response to a lawsuit filed by NRDC. Congress later ratified this approach. See discussion, p. 5, *infra*.

tering waterways and drinking water supplies. In addition, unlike PPT or BAT limits, they protected the nation's multi-billion dollar investment in municipal sewage treatment plants. *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93rd Cong., 1st Sess. 800, 1479 (1973) [hereinafter cited as 1972 *Legis. Hist.*].

For example, the pretreatment standards were intended to stop highly damaging industrial chemicals from interfering with sewage treatment plant performance, as happened in Louisville, Kentucky where the sewer system exploded from industrial contaminants, according to EPA. Transcript of Oral Argument in Court of Appeals at 271. The pretreatment standards also were supposed to prevent toxic industrial pollutants from contaminating sewage treatment plant sludge, which, if laden with toxics, limits a municipality to expensive or environmentally troublesome sludge disposal options. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2nd Sess. 690 (1978) [hereinafter cited as 1977 *Legis. Hist.*]. Kokomo, Indiana illustrates the point; that city's sludge became so toxic with electroplating wastes that the state, according to EPA, declared the sludge a hazardous waste. Transcript of Oral Argument in Court of Appeals at 271. Thus, Congress put EPA on an even faster schedule for setting pretreatment than for BPT and BAT requirements.<sup>3</sup> It told EPA to use the pretreatment standards "to prevent, to the maximum extent feasible, the industrial pollutants from entering the [municipal sewage treatment] plant in the first place." 1977 *Legis. Hist.*, *supra*, at 690.

From 1972 to 1977, EPA issued a series of BPT, BAT, and pretreatment requirements. Most of its BPT limits included a provision authorizing variances for those sources

<sup>3</sup> For example, Congress gave EPA one year to issue guidelines for developing BPT and BAT, but only 120 days to do so for pretreatment. In addition, EPA had only 180 days from enactment to propose, and 90 more days to publish, pretreatment standards. Cf. Section 304(b)(1) and (2), 33 U.S.C. 1314(b)(1) and (2), with Sections 304(f)(1) and 307(b)(1), 33 U.S.C. 1314(f)(1) and 1317(b)(1).



which were "fundamentally different" (in terms of the factors relevant to BPT) from the sources in EPA's data base. The pretreatment and BAT limits did not include such a variance.

EPA's initial round of standard-setting led to substantial litigation. The technological issues were, indeed, complex, but EPA by its own admission failed to devote adequate resources to the task and lacked a reservoir of industry-oriented expertise in its infant regulatory program. *Id.* at 1463. The result, in the eyes of Congressional investigating staff, was "uneven performance." *Id.* at 335.

In addition, significant questions of statutory interpretation arose. This Court resolved one such issue, upholding EPA's authority to issue industry-wide regulations for BPT and BAT against an industry challenge in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). *DuPont* held that Congress clearly contemplated national rules for BAT, which, by its terms, applied to "categories and classes" of sources. *DuPont* also held that the law authorized national regulations for BPT, even though the statute, which spoke of individual "point sources" rather than categories and classes of sources, was not as clear on this point. The Court, however, held that the "fundamentally different factors" or "FDF" variance clause in EPA's BPT rules made the rules sufficiently flexible for individual point sources. *Id.* at 126-128. *DuPont* did not address variances from the Act's BAT or pretreatment requirements; it did, however, hold that EPA could not create variances which were not authorized by statute from the Act's new source standards. *Id.* at 137-139.

In 1977, shortly after *duPont*, Congress took stock of the law. It found that progress in controlling conventional pollutants, the principal targets of BPT requirements, had been greater than anticipated, notwithstanding the challenges to EPA's regulations. 1977 *Legis. Hist.*, *supra*, at 330. It therefore eased future control requirements for conventional pollutants.<sup>4</sup>

<sup>4</sup> In Sections 301(b)(2)(E) and 304(b)(4) of the Act, 33 U.S.C. (Supp. V) 1311(b)(2)(E) and 1314(b)(4), Congress created a new technology-based requirement, "best conventional pollution control technology." This new requirement would be at least equal to BPT, but possibly not as stringent as BAT. 1977 *Legis. Hist.*, *supra*, at 427-428.

At the same time, Congress conceded that the principal regulatory mechanism for control of toxics had failed. 1977 *Legis. Hist.*, *supra*, at 326-327. Alarmed by mounting evidence of the seriousness and ubiquity of these pollutants, Congress ordered a "major redirection and refinement" of EPA's regulatory program to focus control on toxics. *Id.* at 326-327, 454-455, 862-865. First, Congress elevated the importance of pretreatment and BAT requirements. It directed EPA to use these requirements to control toxics, essentially codifying a settlement agreement<sup>5</sup> formulated by NRDC and EPA. *Id.* at 455. This agreement required EPA to upgrade BAT, pretreatment, and new source standards to include specific limits on 65 toxic compounds in 21 industrial categories. *Id.* at 336.

Second, Congress enacted several amendments strengthening the pretreatment program.<sup>6</sup> It reaffirmed the technology-forcing aspects of pretreatment standards, repeatedly emphasizing that these standards should reflect technology comparable to BAT for direct dischargers. *Id.* at 271, 342, 403, 461, 690.

Finally, Congress defined when, and under what conditions, sources could obtain variances from BAT and pretreatment requirements. It cut back on the economic capability variance in the 1972 law, eliminating its use for toxic pollutants.<sup>7</sup> It created a new "safety valve" to give flexibility to BAT limitations, again prohibiting its use for toxics.<sup>8</sup> It did not create any variances from pretreatment standards, but it did allow indirect dischargers to get a "credit" for removal occurring at the municipal sewage treatment plant, in effect splitting the pollution control between the indirect discharger

<sup>5</sup> *NRDC v. Train*, 8 Env't. Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified sub nom. *NRDC v. Costle*, 12 Env't. Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified sub nom. *NRDC v. Gorsuch*, Nos. 2153-73, et al. (D.D.C. Oct. 26, 1982), modified sub nom. *NRDC v. Ruckelshaus*, Nos. 2153-73, et al. (D.D.C. Aug. 2, 1983 and Jan. 6, 1984).

<sup>6</sup> *E.g.*, Congress gave EPA direct enforcement authority against non-complying indirect dischargers and enhanced the ability of pretreatment standards to protect sludge quality. 1977 *Legis. Hist.*, *supra*, at 690.

<sup>7</sup> Section 301(c), 33 U.S.C. 1311(c); 1977 *Legis. Hist.*, *supra*, at 328.

<sup>8</sup> Section 301(g), 33 U.S.C. (Supp. V) 1311(g); 1977 *Legis. Hist.*, *supra*, at 674-675.



and the sewage treatment plant.<sup>9</sup> Simultaneously, it enacted Section 301(f), 33 U.S.C. (Supp. V) 1311(f), which said: "The Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant \*\*\*."<sup>10</sup> It stressed that EPA could only grant variances for non-toxic pollutants, and urged EPA to err on the side of caution in applying this mandate.<sup>11</sup>

Six months later, EPA issued pretreatment regulations which, unlike its pre-1977 pretreatment standards, contained an FDF variance provision covering all pollutants, including toxics. 40 C.F.R. 403.13(Pet. App. A122).<sup>12</sup> EPA explained that this variance could be used for information which "will not be available or, for other reasons, will not be considered" during standard-setting. 40 C.F.R. 403.13(b). Neither the rule nor the accompanying preamble made any reference to Section 301(f). NRDC promptly challenged the variance.

One year later, EPA issued BAT rules which, for the first time, contained a similar variance provision. 44 Fed. Reg. 32854, 32893-32894 (June 7, 1979). Again, EPA made no mention of Section 301(f). Again, NRDC sued. This suit is still pending in the D.C. Circuit.<sup>13</sup>

NRDC raised two arguments below. First, it contended that all FDF variances from pretreatment standards were illegal; they were not authorized by statute any more than the new source variance invalidated in *daPont*. Second, NRDC

<sup>9</sup> Section 307(b), 33 U.S.C. (Supp. V) 1317(b), 1977 *Legis. Hist.*, *supra*, at 271-272.

<sup>10</sup> Congress listed the toxic pollutants covered by Section 301(f), incorporating the list developed by NRDC and EPA in the Consent Decree, n. 5, *supra*. EPA had authority to revise the list. Section 307(a)(1), 33 U.S.C. (Supp. V) 1317(a)(1).

<sup>11</sup> *E.g.*, "[T]he bill prohibits variances for [toxic] pollutants \*\*\*. The committee's intent is to prohibit both those pollutants known to be toxic or hazardous and those suspected of being toxic or hazardous." 1977 *Legis. Hist.*, *supra*, at 677.

<sup>12</sup> EPA issued the variance on June 28, 1978, 43 Fed. Reg. 27736-27773, and amended it on January 28, 1981, 46 Fed. Reg. 9404-9405. The 1978 regulations differed in several respects which are not relevant here.

<sup>13</sup> *NRDC, et al. v. EPA*, Nos. 80-1407, *et al.*

argued that FDF variances from pretreatment standards for toxics violated the newly-enacted Section 301(f).

The Third Circuit declined to address the broader question raised by NRDC's first argument.<sup>14</sup> Instead, it held that EPA's FDF variance clause violated Section 301(f). (Pet. App. A36-A43).

## SUMMARY OF ARGUMENT

### I.

The question before this Court is whether the Third Circuit correctly held that Section 301(f) of the Clean Water Act prohibits EPA from granting variances from national pretreatment standards for toxic pollutants. To resolve this question, the Court need not accept petitioners' invitation to decide a broader issue: whether EPA may grant variances from pretreatment standards so long as the variances do not involve toxics [and, hence, do not violate Section 301(f)]. The broader issue is not properly presented to this Court because the court of appeals did not reach it.

This case, therefore, does not require this Court to review its decision in *daPont*. The question before the Third Circuit was whether Section 301(f), enacted after *daPont*, prohibits FDF variances from pretreatment standards for toxic pollutants. This turns on the meaning of Section 301(f), something *daPont* could not address. Therefore, it is not surprising that the Third Circuit's decision does not even address *daPont* in its discussion of Section 301(f). (Pet. App. A40-A43). Hence, petitioners' reliance on *daPont* is misplaced.

### II.

The Third Circuit held that Section 301(f) of the Clean Water Act clearly prohibits variances from pretreatment standards for toxic pollutants. Because EPA's FDF variance allows case-by-case modifications to these very standards, the Third Circuit ruled that EPA's variance flies in the face of Section 301(f).

<sup>14</sup> The Third Circuit found it unnecessary to reach this question because it found that EPA had only issued pretreatment standards for toxic pollutants.

Neither petitioner offers a convincing reason for ignoring the statute's plain language. CMA says that the FDF variance is not really a "variance," even though it relaxes uniform, national pollution control requirements for individual sources. CMA's argument distorts the common understanding of the term "variance." EPA takes a different tack. EPA says that the statute is not clear at all, because if Section 301(h) is held to prohibit modifications of pollution control requirements, then it must also be read to prohibit EPA from upgrading standards to reflect new developments in technology. This, says EPA, is so absurd a result that EPA is free to develop its own construction of the statute.

EPA's argument fails on two counts. First, the statute—and the legislative history—make it clear that Congress addressed Section 301(h) to variances, not periodic improvements in the standards. Thus EPA cannot allow an individual source to get by with less stringent pollution control requirements than others in the same industrial class. It can, however, revise the requirements for all.

Second, EPA's construction of the statute does not square with the Act itself. Section 301(h) broadly bans all variances for toxics. EPA cannot narrow its scope to only certain variances [i.e., economic or water quality variances] so that EPA is free to create other variances of its own choosing. Congress wanted a comprehensive ban on variances for toxics; it deliberately restructured Section 301 so that the toxics ban in subsection (h) would cover all Section 301 requirements, not just Sections 301(c) and (g) as EPA maintains.

### III.

The legislative history confirms that Congress intended to ban all variances for toxic pollutants. There is no legislative history to support EPA's view that Congress banned only certain types of variances, leaving EPA free to create others.

EPA, in effect, says that because Congress did not mention FDF variances, Congress approved them despite Section 301(h). EPA's argument is absurd. Congress's primary goal in the 1977 amendments was strict control of toxics. Recognizing that variances could negate the plain thrust of

the amendments, Congress carefully circumscribed EPA's authority to grant variances.

It defies common sense—and ordinary principles of statutory construction, see, e.g., *TVA v. Hill*, 437 U.S. 153 (1978)—to believe that Congress simultaneously gave EPA broad authority to create its own variances. Nor did *duPont* give EPA such authority. Thus, EPA's search for Congressional intent to reverse *duPont* is misguided.

More important, EPA had a well-defined practice in 1977 of restricting FDF variances to BPT limits. EPA did not include FDF variances in its pretreatment or BAT standards. If, as EPA maintains, Congress's silence affirmed agency practice, then Congress ratified the absence, not the presence, of FDF variances from pretreatment standards.

### IV.

FDF variances for toxic pretreatment standards are not permissible or reasonable. They allow individual sources to escape otherwise applicable national standards, contrary to Congress's intent. It does not matter that EPA tries to restrict the scope of the variance to a reexamination of the statutory factors behind BAT. The statute has its own vehicle for applying BAT factors to individual sources: Section 301(c). Since Section 301(c) variances are not available for toxics, neither are FDF variances.

An FDF variance cannot be passed off as mere subcategorization or revision of a rule. EPA designed the FDF variance for use by a single source "within \*\*\* a subcategory." 40 C.F.R. 403.13(b)(Pet. App. A122). FDF variances thus defy Congress's instruction to avoid single plant evaluations in the technology-forcing context of BAT and pretreatment standards. In addition, FDF variances take close to a year or more to resolve. They interfere with the Act's strict compliance deadlines for pretreatment in a way that subcategorization during a rulemaking does not. Finally, the FDF variance is, procedurally, a Rube Goldberg contraption. It wastes EPA's scarce resources and delays compliance with the law. Standard rulemaking (or rule-revising) procedures are simple by comparison.



There are no convincing policy justifications for an FDF variance from pretreatment standards. The variance is not a necessary aspect of pretreatment standards development. It may have served, in a few past cases, to cover agency rulemaking mistakes on BPT limits. But the technology-based regulatory program is long past its infancy. It now has more industry-oriented expertise and more rulemaking experience. It makes no sense for a mature regulatory program to fail to consider information submitted in a rulemaking. Indeed, by doing so, EPA runs the risk that its rules will be overturned in court. It also makes no sense, as a matter of policy, to reward sources which withhold relevant information during a rulemaking with an additional opportunity for relief from otherwise applicable standards.

There are sound policy reasons for prohibiting FDF variances from toxic pretreatment standards. Focusing on atypical plants during the rulemaking could generate information which enhances the technology-forcing nature of the pretreatment standards for an entire industrial class. It will use agency resources more efficiently. It will avoid prolonged uncertainty over pollution control obligations for some plants. It will prevent unqualified applicants from using the variance process to buy time. And it will avoid the competitive inequities inherent in a phased approach to standard-setting within the same industrial category. Thus, the Third Circuit's decision will facilitate, rather than disrupt, implementation of the Act.

### ARGUMENT

#### 1. This case turns on the meaning of Section 301(f) of the Clean Water Act.

The question before this Court is whether the Third Circuit correctly held that Section 301(f) of the Clean Water Act prohibits EPA from granting FDF variances from national pretreatment standards for toxic pollutants. The Third Circuit began with an analysis of Section 301(f). It found that Section 301(f) was clear, that it prohibited any variances from toxic pretreatment standards, and that this prohibition was fully in accord with the thrust of the 1977 amendments to the law. It also found no convincing policy grounds to differentiate FDF

variances from other variances indisputably prohibited by Section 301(f). Thus, the Third Circuit ruled that the FDF variance for toxic pretreatment standards violated Section 301(f). (Pet. App. A40-A43).

EPA therefore invites this Court to begin its analysis with something other than the plain words of the statute. Neither the Clean Water Act nor its legislative history mention the FDF variance, so EPA retreats to *duPont* and *EPA v. National Crushed Stone Ass'n.*, 449 U.S. 64, 72 (1980), which recognized EPA's implicit authority to grant FDF variances from BPT effluent limits.

Before *duPont*, EPA had used the FDF variance only for BPT limits. Its pretreatment and BAT standards did not contain FDF variance clauses. The variance, however, proved a convenient crutch for the standard-setters. In 1978, therefore, EPA added an FDF variance to the pretreatment program for the first time. In 1979, it added the same variance to its BAT standard-setting program. EPA now seeks justification for its expanded use of the FDF variance in *duPont*. *DuPont*, says EPA, prospectively sanctioned FDF variances from BAT as well as BPT limits (and hence, by analogy, from pretreatment standards too). EPA is wrong.

*DuPont* and *National Crushed Stone Ass'n.* were, indeed, pivotal cases. They cleared the way for the first phase of EPA's regulatory program. They allowed EPA to sidestep the quagmire of case-by-case standard-setting with industry-wide rules. In the words of one enthusiastic Member of Congress, *duPont* especially "quashed any hopes these industries had of getting around the law." 1977 *Legis. Hist.*, *supra*, at 1318. But neither case had the broad reach EPA now ascribes to it.

*DuPont* tried to reconcile the Clean Water Act's application of BPT to "point sources" with the overall statutory scheme which applies BAT (and pretreatment and new source standards) to "categories and classes" of sources. The Court concluded that BPT, like BAT, could be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 [*i.e.*, BPT] limitations." 430 U.S. at 128

(emphasis added). In short, *duPont* held that the FDF variance was a "necessary aspect" of BPT limits. *National Crushed Stone Ass'n.*, *supra*, 449 U.S. at 72. *DuPont* also implicitly found that an FDF variance was not a necessary aspect of BAT limits because it upheld BAT rules which did not contain an FDF variance clause.<sup>15</sup>

Congress may have been ambiguous in its instructions to EPA with respect to BPT, but it was explicit regarding BAT. Congress created its own BAT variance in Section 301(c) of the Act, 33 U.S.C. 1311(c), and deemed this the sole deviation from otherwise uniform, national standards:

*Except as provided in section 301(c) of this Act, the intent of the Congress is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines \*\*\* so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.*

1972 *Legis. Hist.*, *supra*, at 309 (emphasis added).

EPA seizes *duPont*'s statement that there is no "radical difference in the mechanism used to impose limitations for the [BPT] and [BAT] deadlines." 430 U.S. at 127. EPA takes the statement out of context. As this Court explained: "[N]o proper inference could be drawn from *duPont* that the grounds for issuing variances from the [BAT] limitations should also be the grounds for permitting individual point sources to depart from [BPT] standards. Indeed, our opinion recognized that 301(c) was designed for BAT limitations." *National Crushed Stone Ass'n.*, 449 U.S. at 73, n.13 (citation omitted). Just because variances may be granted from BPT limits on grounds that a source is "fundamentally different" from others in the category does not mean that the same arguments entitle

<sup>15</sup> As the Court explained, "The regulations for each subcategory contain a variance clause applicable only to the [BPT] limitations" 430 U.S. at 122-123 (emphasis added).

a source to a variance from BAT or pretreatment standards. (See discussion, pp. 33-35, *infra*).

Indeed, *duPont* struck down nonstatutory variances for new source standards for reasons equally applicable to pretreatment standards. Both pretreatment and new source standards cover categories of sources, rather than individual point sources. Cf. §307(b)(3), 33 U.S.C. 1317(b)(3) with §306(b), 33 U.S.C. 1316(b). Pretreatment, unlike BPT limits, are expressly labelled "standards" in the Act. *Id.* Pretreatment, like new source, standards may require "no discharge."<sup>16</sup> As with new source standards, it is "unlawful for any owner or operator of any source to operate any source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d) (emphasis added). Finally, there is no statutory provision for variances,<sup>17</sup> and a variance provision would be inappropriate because Congress intended pretreatment, like new source standards, to ensure national uniformity and maximum feasible control. See generally 430 U.S. at 138.<sup>18</sup> Thus, *duPont* does

<sup>16</sup> Section 307(b)(1), 33 U.S.C. 1317(b)(1), specifies that a pretreatment standard must "prevent the discharge of any pollutant \*\*\* which \*\*\* interferes with, passes through, or otherwise is incompatible with [the publicly owned treatment works]." (emphasis added).

<sup>17</sup> Sources may be able to get a "credit" for pollutant removal occurring at the publicly owned treatment works, §307(b)(1), 33 U.S.C. (Supp. V) 1317(b)(1), but there are no exceptions to the level of control demanded by the standards.

<sup>18</sup> EPA takes issue with *duPont*'s distinction between new source standards and BPT limits. EPA asserts that BPT limits have, at times, required "no discharge" just like new source standards, and that BPT limits cannot be violated once they are incorporated in a permit either. (EPA Br. 22, n.15). This misses the point. New source standards are not interim measures like BPT. They force technology to the level of the best possible performer. Pretreatment standards, like BAT, serve the same function. 1977 *Legis. Hist.*, *supra*, at 271, 342, 403, 461, 690. As noted earlier, pretreatment standards should "prevent, to the maximum extent feasible, the industrial pollutants from entering [the municipal sewage] plant in the first place." *Id.* at 690 (emphasis added).

CMA, on the other hand, argues that new sources are distinguishable from existing indirect dischargers on policy grounds. New sources have not yet been constructed, says CMA, so uniform standards will not require changes in technology, operation or processes for these plants. (CMA Br.



not give EPA broad authority to create variances from pretreatment or BAT standards. More important, *duPont* does not address Section 301(f), which was enacted after *duPont*. The question here, however, is the meaning of Section 301(f). *DuPont* has no bearing on this issue. Hence, petitioners' reliance on *duPont* is misplaced.

**2. Section 301(f) of the Clean Water Act clearly prohibits FDF variances from pretreatment standards for toxic pollutants.**

The essence of the Third Circuit's ruling is that Section 301(f) of the Clean Water Act is clear: it provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Pretreatment standards are indisputably requirements of Section 301. EPA's FDF variance would nonetheless have allowed EPA "on a case-by-case basis" to "adjust" pretreatment standards, making them less stringent for some plants.<sup>20</sup> The court of appeals correctly ruled that these changes "modify" pretreatment standards so as to fall within the prohibition of Section 301(f). (Pet. App. A40-A43).

Below, petitioners were united in their theory of this case. They now part ways. CMA argues that an FDF variance is not a "variance" at all, but rather "an individualized BAT limitation or standard, based on the application of the statutory BAT factors to that plant." (CMA Br. 26). Hence, says CMA, an FDF variance could not possibly "modify" a requirement of Section 301. CMA engages in sophistry. Once EPA pro-

(*Footnote continued*)

21, n.22). This argument is specious. New sources can be just as variable in their processes as existing sources—or more so. Moreover, variability for new sources is more difficult to anticipate in a rulemaking because the companies which will be affected and the processes they will seek to construct may not yet be identifiable. In any event, it is up to Congress to decide whether variances from pretreatment and BAT standards for toxics should be prohibited as they are for new sources. Arguments as to whether Congress made the proper choice are irrelevant.

<sup>20</sup> 40 C.F.R. 403.15(b)(4)(Pet. App. A122). The rules would also have allowed EPA to make pretreatment standards "more stringent," but this addition is purely disingenuous, as all FDF variance applications for both direct and indirect dischargers have sought weaker, not stronger, pollution control limits.

mulgates a pretreatment standard, all sources in the affected industrial category must comply with a uniform, national standard unless they obtain an FDF variance. Whether the FDF alteration is called a "variance" or an "individualization," it "modifies" otherwise applicable requirements. See pp. 30-32, *infra*.

EPA initially agreed with CMA. Throughout this litigation—indeed, in its petition for certiorari—EPA argued that an "FDF variance does not 'modify' a requirement of Section 301 \*\*\*." (EPA Pet. 13). Now EPA concedes that "on first reading the statutory language appears to support the Third Circuit's analysis \*\*\* and an FDF variance 'modifies' such a [pretreatment] standard in the dictionary sense of the word, *i.e.*, it changes or alters it." (EPA Br. 24).

Instead, EPA now advances a new justification for ignoring the plain language of Section 301(f). EPA fabricates a conflict between Section 301(f)'s prohibition against "modifying" toxic limits for particular sources and EPA's duty to "revise" national pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change." Section 307(b)(2), 33 U.S.C. 1317(b). (EPA Br. 25).

EPA's new theory is a red herring. It confuses variances with periodic improvements to a rule. The dictionary defines "revise" to mean "correct," "improve," or "make \*\*\* up-to-date." *Webster's Third New International Dictionary* 1944 (1976). "Modify," on the other hand, has two senses. EPA mentions one, *i.e.*, "change," but omits mention of the other, "make more temperate and less extreme: lessen the severity of: moderate." *Id.* at 1452.

Congress used both senses of the word "modify" in the Clean Water Act to mean simply any change, such as a change in an industrial facility subject to the Act,<sup>21</sup> or a specific type of change, *i.e.*, a variance. It consistently used the latter sense of the word throughout Section 301—indeed, it did so twenty-

<sup>21</sup> *E.g.*, Section 200(b)(2)(C)(ii), 33 U.S.C. 1300(b)(2)(C)(ii), of the Act requires that area-wide waste treatment management plans regulate the "location, modification, or construction" of polluting facilities.

five times. Each time Congress employed the word "modify" to create authority to vary pollution control requirements. Each time, it allowed EPA to tailor national standards to individual plants. Thus, a company could, under carefully circumscribed conditions, obtain relief from Section 301 requirements for economic reasons, Section 301(c), 33 U.S.C. 1311(c); water quality reasons, section 301(g), 33 U.S.C. (Supp. V) 1311(g); or lack of a publicly owned treatment works to accept the company's wastes, Section 301(i)(2), 33 U.S.C. (Supp. V) 1311(i)(2). In addition, a publicly owned treatment works could obtain a reduction of Section 301 requirements for discharges to marine waters, Section 301(h), 33 U.S.C. (Supp. V) 1311(h), or lack of federal construction grant funds, Section 301(i)(1), 33 U.S.C. (Supp. V) 1311(i)(1).

Congress plainly understood "modify" in Section 301 to be synonymous with "variance:" it repeatedly equated the words "modification" and "waiver,"<sup>21</sup> and it called Section 301(c) a "variance" provision even though the language of that section speaks solely of "modified" pollution control requirements. 1977 *Legis. Hist.*, *supra*, at 461.

Because the latter legislative history is so at odds with EPA's position here, EPA tries to dismiss it as a "passing" reference during floor debate. (EPA Br. 26). The speaker was, however, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and principal author of the 1977 amendments on toxics. His words, entitled to considerable weight on their own, are buttressed by the equation of the two terms in the Senate Committee Report.<sup>22</sup> Indeed, EPA itself used the words "variance" and "modification" interchangeably four times in its Senate testimony.<sup>23</sup> This Court,

<sup>21</sup> See, e.g., the discussion of Section 301(c), 1977 *Legis. Hist.*, *supra*, at 328-329, 331; Section 301(g), *id.* at 328-329, 331, 355, 641, 674-676, 686, 676; and Section 301(h), *id.* at 320-321, 447-448, 639, 677-678, 879, 879, the economic capability, water quality, and ocean discharge waivers, respectively.

<sup>22</sup> *Id.* at 676-677. The Committee called the statutory 301(g) modification provision a "variance."

<sup>23</sup> EPA used the term "variance" to describe both the statutory 301(c) modification provision, *id.* at 1102, 1124, and the statutory 301(h) modification provision, *id.* at 1419, 1438.

too, has equated the two terms in construing the very section of the Clean Water Act at issue here.<sup>24</sup> In short, "modify" in Section 301 means a "waiver" or "variance" from pollution control standards.

There is no conflict between a ban against variances and the duty to revise national standards. There are, for example, no variances from the Clean Water Act's new source performance standards, *duPont*, 430 U.S. at 137-139, yet EPA must periodically revise these standards just like pretreatment standards. Section 306(b)(1)(B), 33 U.S.C. 1316(b)(1)(B). This Court has already ruled that "a variance is generally thought to be of specific applicability," whereas a revision may be general or specific depending on the circumstances. *Train v. NRDC*, 421 U.S. 60, 88-89 (1975). The instruction to revise pretreatment standards here was intended to avoid technological stagnation of national standards. It parallels the language Congress used to require EPA to update other nationally applicable rules after either periodic review of the rule or new developments in pollution control. Cf. Sections 301(d) (effluent guidelines) and 306(b)(1)(B) (new source standards), 33 U.S.C. 1311(d) and 1316(b)(1)(B), with Section 307(b)(2), 33 U.S.C. 1317(b)(2).<sup>25</sup>

Read together, these separate statutory provisions make EPA's obligations clear: EPA has a duty to develop the best national pollution control standards possible within the limits of current scientific knowledge. It has a concomitant duty to review these standards from time to time and update them to reflect new developments in technology. It cannot, however, make these national standards less stringent for individual plants, at least where toxics are concerned. This result may be decidedly inconvenient to EPA, but it is neither absurd nor unreasonable.

<sup>24</sup> In *National Crushed Stone Assn.*, this Court referred to the statutory 301(c) modification provision as a "variance." 449 U.S. at 71.

<sup>25</sup> Elsewhere in its brief, EPA acknowledges that revisions are more broadly applicable than variances. See, e.g., EPA Br. 35, n.26: "Clearly \*\*\* this [revision] provision is intended to reflect periodic changes in the industry \*\*\*."



Since the statute is not ambiguous, EPA can't substitute its own interpretation for the plain words of Section 301(f). See *SEC v. Sloan*, 436 U.S. 103, 117-119 (1978). This is particularly true where, as here, EPA's interpretation of the statute does not square with the structure of the act itself. See *Volkswagenwerk v. FMC*, 390 U.S. 261, 272-275 (1968) (rejected narrow reading of statutory provision because it did not square with the structure of the statute). Nothing on the face of this statute authorizes EPA to read qualifying language into the plain words of Section 301(f)<sup>18</sup>. The statute does not say, "The Administrator may not, pursuant to subsections (c) and (g) of this section, modify any requirement of this section \*\*\*;" it simply says there can be no modifications of any sort.

This Court has repeatedly held that an agency can neither enlarge upon, nor narrow, the terms of a statute. *Volkswagenwerk*, 390 U.S. at 273-275; *United States v. Calamuro*, 354 U.S. 351 (1957). Just because the act uses the word "modification" in Sections 301(c) and (g) does not mean that EPA can construe Section 301(f) to apply only to modifications under subsections (c) and (g). This construction of the statute would make Section 301(f) largely redundant—at least insofar as it applies to subsection (g), which, by its terms, cannot be applied to toxics.<sup>19</sup>

<sup>18</sup> CMA contends that the general rulemaking authority contained in Section 301(a) of the Act, 33 U.S.C. 1361(a), constitutes independent statutory authority for the FDF variance. It claims that EPA itself does not advance. (CMA Br. 23). Section 301(a) authorizes the Administrator of EPA to "prescribe such regulations as are necessary to carry out his functions under this Act." Citation to Section 301(a) adds nothing to this case. This general grant of authority does not override the specific prohibition of Section 301(f). Moreover, the FDF variance may be an administrative convenience to EPA in the short run, but it is not "necessary" to development of pretreatment standards. See discussion, pp. 37-38, *supra*.

<sup>19</sup> Section 301(c), 33 U.S.C. 1361(c), allows BAT standards to be modified if they surpass the economic capability of the discharger. Section 301(g), 33 U.S.C. (Supp. V) 1311(g), allows similar modifications to BAT standards where water quality warrants. EPA contends here that Section 301(f) applies only to subsections (c) and (g) of Section 301.

<sup>20</sup> Section 301(g) allows the Administrator to modify standards governing the discharge of any pollutant "other than \*\*\* toxic pollutants."

In addition, if Congress intended subsection (f) to apply primarily to subsection (c), it would have had no reason to move the ban against variances for toxics out of Section 301(c) and into a separate, more broad-reaching statutory section. Yet this is precisely what the conferees did. S. 1952, the bill reported out of the Senate Environment and Public Works Committee, added a proviso to the original economic variance provision in Section 301(c) in order to ban variances for BAT and pretreatment standards.<sup>20</sup> This provision passed the Senate intact. 1977 *Legis. Hist.*, *supra*, at 1076. The conferees deleted the proviso from Section 301(c). Instead, they added subsection (f) and reworded the ban on variances so that it applied not only to pretreatment and BAT standards, but to all requirements of Section 301, including any more stringent toxic effluent standards.<sup>21</sup>

Significantly, the conferees did not affix the new subsection (f) to Sections 43 through 46 of the Conference bill, which amended Section 301 of the law and were entitled "Waiver" or "Modification" provisions. 1977 *Legis. Hist.*, *supra*, at 203-207. Instead, they affixed subsection (f) to Section 53 of the Conference bill, entitled "Toxic Pollutants." *Id.* at 210-211. This section bypassed cumbersome rulemaking proceedings and listed the specific toxic pollutants of concern to Congress. It required each source of these pollutants to meet effluent limitations reflecting best available technology, and gave the Administrator authority to set even more stringent toxic effluent standards (or an outright prohibition on discharge) if warranted. It also made a series of other statutory changes, all intended to enhance control of toxics. *Id.* at 459-460. Congress's deliberate placement of Section 301(f) here, rather than in portions of the bill amending Section 301(c) of the

<sup>20</sup> The proviso read: "[T]he Administrator may not modify the requirements of subsection (B)(2)(A) of this section [i.e., the BAT and pretreatment standards] with respect to any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant \*\*\*." 1977 *Legis. Hist.*, *supra*, at 384.

<sup>21</sup> The Administrator has discretion to set toxic effluent limits more stringent than BAT if BAT is not effective against persistent, hazardous toxics. Sections 301(b)(2)(D) and 307(a), 33 U.S.C. (8 Supp. V) 1311(b)(2)(D) and 1317(a).

law, further evidences Congress's intent that subsection (f) operate as a general ban on variances for toxics and not, as EPA contends, as a mere refinement of the conditions for obtaining a Section 301(c) economic variance.<sup>19</sup>

**3. The legislative history of the Clean Water Act confirms that Congress intended to ban all variances, including FDF variances, from pretreatment standards for toxic pollutants.**

Having decided that the language of Section 301(f) was clear, the court of appeals properly examined the legislative history to confirm its reading of the statute. *United States v. Calbert*, 435 U.S. 371, 374, n.4 (1978); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976); *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 278 (1929). The court found two overriding themes: first, the elimination of the discharge of toxic pollutants had always received special emphasis under the Act, increasingly so during the 1977 amendments. (Pet. App. A40). Second, Congress used the term "modification" interchangeably with "waiver" and "variance." Since Section 301(f) forbids modifications, the court reasoned, it forbids variances such as the FDF variance. (Pet. App. A41-A43).

EPA counters with two arguments. First, says EPA, Congress was primarily focusing on the statutory modifications which Congress had authorized [*i.e.*, Sections 301(c) and (g)], rather than on the FDF variance. Second, and in EPA's view "more telling," is the absence of any express indication that Congress intended to alter EPA's allegedly "well-established"

<sup>19</sup> EPA does not address the implications of moving the ban on variances for toxics out of subsection (c) and into a separate subsection. CMA does, but offers an explanation that is both reflected and wholly unsupported by citation to the legislative history. (CMA Br. 29-30). CMA hypothesizes that Congress consolidated the ban in subsection (f) to avoid repeating it in both subsections (c) and (g). If so, Congress's action was futile, because subsection (g) still contains an express prohibition on variances for toxics. Moreover, CMA ignores the fact that Congress not only moved the ban, it also amended the language so that subsection (f) now reaches beyond the BAT standards addressed in subsection 301(c). This makes it even more unlikely that Congress only had Section 301(c) in mind when it wrote Section 301(f).

and "well-known" practice of "granting FDF variances." (EPA Br. 20). Neither argument withstands analysis.

EPA's first point, that Congress's focus lay elsewhere, is simply a subterfuge for the lack of any legislative history to demonstrate that Section 301(f) limits only Section 301(c). EPA's case hinges on a single word in Congressman Roberts' floor explanation of the conference bill:

Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

1977 *Legis. Hist.*, *supra*, at 328-329 (emphasis added). This alone proves nothing. Congressman Roberts had no reason to list other examples of variances prohibited by section 301(f). Congress did not believe other variances were authorized. 1972 *Legis. Hist.*, *supra*, at 172, 309, and EPA had not yet promulgated an FDF variance for either pretreatment or BAT standards. (See discussion of EPA practice, p.28-29, *infra*). In any event, the impetus for restricting variances came from the Senate, and the conferees intended the more explicit discussions in the Senate Report to govern. 1977 *Legis Hist.*, *supra*, at 434.

The Senate Report plainly states: "In order to reemphasize that modifications to BAT are intended for non-toxic \*\*\* pollutants" only, the bill prohibits variances for [toxic] pollutants." 1977 *Legis. Hist.*, *supra*, at 677. Senator Muskie reiterated this point during the debate on the conference substitute: "Like toxic pollutants for which there are no waivers or modifications, there are no potential waivers or modifications for conventional pollutants." *Id.* at 438 (emphasis added).

<sup>20</sup> The Senate bill would also have allowed waivers for conventional pollutants, but this was deleted in conference in favor of "best conventional pollution control" requirements. See n. 4, *supra*.



The House, which accepted the Senate language in conference, understood the bill to contain a ban on waivers for toxics. Mr. Roberts said:

Another major problem area was the law's strict requirements for industry that would cost millions of dollars and result only in a little more clean up of our waters. The conferees wrestled with this problem and developed a fair and workable compromise. Strict requirements are still in effect for damaging pollutants, such as toxics. However, for certain other pollutants, industry may get a waiver.

*Id.* at 305 (emphasis added). Indeed, some House Members wondered aloud whether Congress had, by denying any waivers for toxics, gone too far: "[T]he classification of an extensive new listing of substances as 'toxic'—an action not taken in either the House or Senate versions of the bill—and denial of any waiver with respect to these materials can lead to new regulations more restrictive than any previously contemplated." *Id.* at 411 (emphasis added). These repeated assertions of no variances, waivers, or modifications for toxics contain no qualifying language.

To create an exception for the FDF variance, EPA must resort to inference. Even if this were a permissible way to read either the statute or the legislative history—and we submit it is not—the inference here does not lie in the direction in which Congress sought to move the law. The 1977 amendments effected a "major redirection" of EPA's regulatory program in order to control toxics. *Id.* at 326, 454. Congress found "the only practical way" to solve this ubiquitous problem was "on an industry-by-industry basis \*\*\* [by] category or subcategory." *Id.* at 453. Variances for individual sources could only impede the effectiveness of this statutory scheme.

Thus, the 1977 amendments plainly sought to curtail EPA's authority to grant case-by-case variances from upcoming pollution control requirements. For example, Congress eliminated, at least for toxics, the only provision in the 1972 Act allowing modifications of BAT standards (*i.e.*, the eco-

nomic capability waiver of Section 301(c)).<sup>33</sup> At the same time, Congress created only one new modification provision for BAT, the water quality variance of Section 301(g). It expressly precluded toxics from the reach of this variance and, even with respect to other pollutants, imposed strict conditions on its use, including possible filing of a bond or other security to assure compliance.<sup>34</sup> Finally, Congress refused to accept other variances such as a two year stay of requirements for industries, like the financially hard-pressed steel industry, vital to the "national interest." 1977 *Legis. Hist.*, *supra*, at 324.

It is inconceivable that Congress would have gone to such detail in specifying when and where variances could be created if, as EPA contends, it intended to leave open "the question [of] which changes are allowed and which are proscribed." (EPA Br. 26). Indeed, EPA's assertion that Section 301(f) must have been intended to rule out statutorily created variances, not "nonstatutory" variances such as the FDF violates a cardinal rule of statutory construction. Where Congress has expressly created exceptions to a statute, "nonstatutory" exceptions are not available. *TVA v. Hill*, 437 U.S. 153, 188 (1978).

EPA argues that the well-settled rule of law restated in *TVA v. Hill* is "flatly inconsistent with *duPont*." (EPA Br. 30). EPA misconstrues both cases. *TVA* addressed the ex-

<sup>33</sup> The Senate wanted to extend this ban to nonconventional pollutants, those in the gray area between toxics and conventionals, as well, but abandoned this point in conference only "in order to obtain action on this legislation." 1977 *Legis. Hist.*, *supra*, at 429.

<sup>34</sup> To qualify for a Section 301(g) variance, a source must show: 1) that it will comply, at a minimum, with any applicable BPT, secondary treatment, state law, or water quality requirements; 2) that a variance for this source will not result in any additional requirements for any other source; and 3) that a variance will not adversely affect human health or the environment. In addition, while its application is pending, the source must continue to comply with the standards from which a variance is sought unless the Administrator grants a stay after finding that there is a substantial likelihood the application will succeed on the merits. If the Administrator so finds, he may condition a stay on the filing of a bond or other security to assure timely compliance in the event that the variance is denied. 33 U.S.C. (Supp. V) 1311(g) and (j).

ceptions to a statutory rule; *duPont* wrestled with Congress's silence on what the rule itself should be. *DuPont* was precipitated by the Clean Water Act's failure to say whether BPT limits should be set nationally or case-by-case. The Act appeared to warrant national standards akin to BAT and new source standards, but it used different language to describe the BPT limits. The BAT provisions focused on "categories and classes" of sources; the BPT provisions spoke of individual "point sources". *DuPont* resolved the tension between the ambiguous language of Section 301 and the overall thrust of the statute with a hybrid resolution of the issue. The Court concluded that BPT, like BAT, can be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations." 430 U.S. at 128.

*DuPont* did not, as EPA claims, hold that nonstatutory variances are appropriate for either BAT or any other standards. To the contrary, the court struck down a nonstatutory variance for new source standards, *id.* at 137-139, and it upheld EPA's BAT limits even though they did not contain an FDF variance clause. *Id.* at 122-123. Hence *duPont* and *TVA* are not inconsistent. Both cases underscore that EPA may not create exceptions to Section 301(f)'s ban on variances from national pretreatment standards.

EPA nonetheless frames the question before this Court as follows: did Congress intend to reverse *duPont*?<sup>17</sup> This misses the mark. *DuPont* only approved FDF variances for BPT limits. The BAT regulations then before the Court did not contain an FDF variance clause. The Court appropriately assumed that the only BAT variance was the economic capability waiver under Section 301(c) of the Act, and it limited its discussion of BAT variances to Section 301(c).

Congress did address this aspect of *duPont* in 1977: it eliminated Section 301 variances for toxics. 1977 *Legis. Hist.*, *supra*, at 328. Of course, Congress was fully cognizant of the

<sup>17</sup> EPA cites *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) to no avail. The traditional admiralty rule at issue there was both well-settled and well-known. In *Edmonds*, unlike here, there could be no question that Congress acted with the rule in mind.

many arguments that would be put before reviewing courts to find the BAT standards variable. That is why it created Section 301(g) variances:

The bill intends to give the Administrator of EPA a safety valve in the event that the courts find he does not have flexibility in administering the 1983 [BAT] requirements for industries. It authorizes a case-by-case exemption for industries which demonstrate, to the satisfaction of the Administrator, that pollutants in their discharge are not toxic \*\*\* [and] will not interfere with the attainment of the national water quality standard \*\*\*.

*Id.* at 674 (emphasis added). But Section 301(g), like 301(c), variances were not available for toxics. *Id.* The intent is clear: Congress did not want EPA to vary toxic BAT and pretreatment standards. It did not need to reverse *duPont* to accomplish this. *DuPont* is fully consistent with a ban on variances for pretreatment and BAT standards.

EPA's final argument is that Congress, by its inaction, ratified the agency-created FDF variance. This Court has, however, previously ruled that silence is, at best, a "treacherous" guide to Congressional intent; Congress's inaction may betoken nothing more than unawareness or preoccupation with other issues. *Zuber v. Allen*, 396 U.S. 168, 185-186, n. 21 (1969).

This case, more than most, illustrates the wisdom of that maxim. EPA cannot show that Congress was actually aware of EPA's creation; to the contrary, EPA concedes that the legislative history is "devoid of any reference" to the FDF variance. (EPA Pet. 14). Instead, EPA argues that Congress must have known, exaggerating how "well-entrenched" the variance was in EPA practice. (EPA Br. 29). EPA's argument flouts the facts. Only two of 4,000 sources covered by BPT effluent guidelines had actually received an FDF variance by 1977.<sup>18</sup> EPA did not deem the variance sufficiently noteworthy

<sup>18</sup> *Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 96th Cong., 1st Sess. 2741 (1983) [hereinafter cited as 1983 *Hearings*].



to mention in testimony to either the House, 1977 *Legis. Hist.*, *supra*, at 1399-1472, or the Senate, *id.* at 1093-1139."

True, EPA had regulations which, though largely not invoked in practice, had at least theoretically established FDF variances from BPT limits. But this Court has previously ruled that the mere existence of agency regulations is not a sufficient basis from which to presume Congress's knowledge of their content. *United States v. Calamare*, 354 U.S. 351 (1957). It has even refused to infer Congressional approval of agency action in the face of express indications that Congress knew of the action. *TVA v. Hill*, 437 U.S. 153 (1978); *SEC v. Sloan*, 436 U.S. 103, 121-123 (1978) (Senate Committee Report not sufficient indication of widespread Congressional awareness). It does not necessarily follow that because EPA had regulations, Congress knew of them.

Nor would *duPont* have warned Congress that it needed to renounce FDF variances for BAT and pretreatment standards by name. First, *duPont* did not, as EPA claims, prominently discuss FDF variances. (EPA Br. 29). As noted earlier, *duPont* resolved the broader question of whether EPA could even set industry-wide regulations under the Clean Water Act. A few sentences in that opinion mention the existence of a variance, but the Court otherwise declined to address its content or proper scope. Congress focused on the case's broad holding: as one Member said, it "quashed any hopes these industries had of getting around the law." 1977 *Legis. Hist.*, *supra*, at 1318.

More important, while *duPont* discussed BPT and BAT rules, it approved an FDF variance only for BPT. As noted earlier, the rules reviewed in *duPont* contained an FDF variance clause applicable only to the BPT rules. In 1977,

<sup>17</sup> By contrast, Congress was made aware of the FDF variance during the current reauthorization of the Clean Water Act. EPA brought the issue prominently to Congress's attention, asking the House Subcommittee on Water Resources to reverse the Third Circuit's decision. 1983 *Hearings* at 2705-2706, 2724-2726, 2740-2741, 2747-2748. The House passed a bill which declined to do so. H.R. 3282, 98th Cong., 2d Sess. (1984). The bill reported out of the Senate Environment and Public Works Committee the day after the Third Circuit's decision does not contain authority for FDF variances either. S. 431, 98th Cong., 1st Sess. (1983).

however, Congress focused on BAT, not BPT. BPT was merely an interim, "time-limited" measure before final pollution controls. 1977 *Legis. Hist.*, *supra*, at 459. BPT controlled conventional pollutants, not toxics; any toxic removal it obtained was purely incidental to its primary purpose. *Id.* at 335, 1101. By 1977, most sources had complied with BPT. *Id.* at 641, and the pollution control results had been greater than anticipated. *Id.* at 330. Therefore, in the reauthorization, Congress's attention shifted sharply toward toxic pollutants and the BAT and pretreatment requirements designed to control them. *Id.* at 335-336, 454-455, 689-691, 1135-1136. Since Congress considered, and curtailed the circumstances under which these requirements could be modified, it does not make sense to assume that Congress, without mention, would have simultaneously authorized EPA to grant nonstatutory variances for toxic pollutants.

EPA notes that BPT regulations sometimes apply to toxics, citing the rules at issue in *duPont* and in an agency decision granting an FDF variance to a steam electric plant. (EPA Br. 30). EPA infers that if Congress had intended to ban FDF variances for toxics, it would have criticized this aspect of *duPont*. Nothing in *duPont*, however, suggests this fact to Congress and the cited agency decision is unpublished. This is a slim reed on which to rest an argument that Congress's failure to act makes new law. Congress knew that BPT would have "incidental benefits in control of toxics in some industries." EPA had told it so, but had also warned that "even with BPT controls there will continue to be major discharges of toxic pollutants, many of which are potential threats to public health." 1977 *Legis. Hist.*, *supra*, at 1101. In BAT, Congress committed to a second, major, and more stringent phase of technology-based controls. *Id.* at 454-455. Its failure to direct EPA to spend scarce resources wringing more out of BPT for a few plants when BAT would shortly be on line for all is not significant.

In any case, it defies logic to say, as EPA apparently does, that because EPA had adopted an FDF variance for one purpose (*i.e.*, for modifying BPT limits), Congress acquiesced in the use of the variance for other purposes, such as adjusting pretreatment or BAT standards. This Court has

already ruled that Congress will not be presumed to have adopted an agency's construction of a statute when the construction does not apply to the precise conditions presented on prior to re-enactment. *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 279-280 (1929). See also *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959).

EPA had a well-established practice in 1977 of distinguishing in its regulations between BPT limits, on the one hand, and pretreatment and BAT standards, on the other, for variance purposes. BPT regulations contained FDF variance provisions; pretreatment and BAT standards did not. By the end of 1977, EPA had promulgated pretreatment standards for 21 industrial categories. None contained an FDF variance.<sup>38</sup> Likewise, EPA had promulgated at least twenty-one BAT standards. These, too, lacked an FDF variance.<sup>39</sup>

<sup>38</sup> In five industrial categories, the agency set numerical limits for a specific pollutant or pollutants without establishing any variances. 41 Fed. Reg. 5749-5758 (Dec. 9, 1976) (tannery products processing); 42 Fed. Reg. 17444-17449 (Mar. 23, 1977) (petroleum refining); 42 Fed. Reg. 17490-17496 (Mar. 23, 1977) (cotton textile); 42 Fed. Reg. 17534-17540 (July 12, 1977) (electroplating); 42 Fed. Reg. 17294-17298 (July 20, 1977) (inorganic chemicals manufacturing). In sixteen industrial categories, the agency declined to set specific pollutant-by-pollutant limits. The agency held these industries only to the general "prohibited wastes" standard of 40 C.F.R. 40.131; that is, they could not discharge wastes which would "interfere with the operation or performance" of the municipal sewage treatment plant. 39 Fed. Reg. 59802-59804 (Nov. 8, 1974). At the same time, the agency determined that the BPT-level effluent limitations applicable to direct dischargers did not apply to indirect dischargers in the same industrial category. 40 Fed. Reg. 6432-6447 (Feb. 3, 1975) (dairy products processing; grain mills; canned and preserved fruits and vegetables processing; canned and preserved seafood processing; heat and liquid and crystalline cane sugar processing; cement manufacturing; feedlots; organic chemicals manufacturing; soap and detergent manufacturing; glass manufacturing; asbestos manufacturing; pulp, paper and paperboard; meat products; builder paper and roofing felt segment of the builder paper and board mills); 40 Fed. Reg. 57770-57780 (Dec. 1, 1975) (canned and preserved seafood processing); 41 Fed. Reg. 16272-16286 (Apr. 16, 1976) (canned and preserved fruits and vegetables processing); 42 Fed. Reg. 17496-17504 (Mar. 23, 1977) (leather tanning); 42 Fed. Reg. 20079-20084 (May 26, 1977) (textile mills).

<sup>39</sup> E.g., 39 Fed. Reg. 4034-4038 (Jan. 31, 1974) (sugar processing); 39 Fed. Reg. 5754-5758 (Feb. 14, 1974) (dredging); 39 Fed. Reg. 5712-5719

(footnote continued)

Several early pretreatment and BAT rulemakings presented the very facts which EPA now uses to justify an FDF variance (i.e., unique plants within a larger industrial category). In each case, EPA resolved industry's concern without resort to an FDF variance. It chose a variety of tools. In some cases, it created a new subcategory;<sup>40</sup> in others, it told sources to avail themselves of the economic variance contained in section 301(c) of the Act.<sup>41</sup> In still others, it emphasized that pretreatment and BAT standards (unlike BPT) would be revised and encouraged sources to participate in the revision.<sup>42</sup> Throughout, EPA applied FDF variances only to BPT limits.

(footnote continued)

(Feb. 14, 1974) (glass manufacturing); 39 Fed. Reg. 4790-4794 (Feb. 20, 1974) (cement manufacturing); 39 Fed. Reg. 7526-7533 (Feb. 26, 1974) (adhesive manufacturing); 39 Fed. Reg. 7934-7936 (Feb. 28, 1974) (meat products); 39 Fed. Reg. 9612-9615 (March 12, 1974) (inorganic chemical manufacturing); 39 Fed. Reg. 10712-10718 (March 20, 1974) (grain mills); 39 Fed. Reg. 10862-10868 (March 21, 1974) (canned and preserved fruits and vegetables processing); 39 Fed. Reg. 11710-11714 (March 28, 1974) (electroplating); 39 Fed. Reg. 12910-12922 (April 5, 1974) (plastics and synthetic); 39 Fed. Reg. 13176-13180 (April 12, 1974) (soap and detergent manufacturing); 39 Fed. Reg. 14676-14683 (April 25, 1974) (organic chemical manufacturing); 39 Fed. Reg. 16776-16780 (May 9, 1974) (builder paper and roofing felt segment of the builder paper and board mills category); 39 Fed. Reg. 18794-18809 (May 28, 1974) (dairy products processing); 39 Fed. Reg. 18742-18752 (May 29, 1974) (pulp, paper and paperboard); 39 Fed. Reg. 24114-24130 (June 28, 1974) (iron and steel manufacturing); 39 Fed. Reg. 24736-24748 (July 3, 1974) (textile industry); 40 Fed. Reg. 4792-4807 (Jan. 30, 1975) (canned and preserved seafood processing); 40 Fed. Reg. 57770-57780 (Dec. 1, 1975) (canned and preserved seafood processing); 41 Fed. Reg. 16272-16286 (Apr. 16, 1976) (canned and preserved fruits and vegetables processing).

<sup>40</sup> E.g., 39 Fed. Reg. 24736 (July 3, 1974).

<sup>41</sup> E.g., 40 Fed. Reg. 57770, 57776 (Dec. 1, 1975).

<sup>42</sup> E.g., EPA designated the tannery product processing pretreatment rule "interim final" and simply solicited more information for the final round of rulemaking: "[T]here may be specific situations where the costs may be underestimated. However, these costs are considered average. The Agency solicits the submission of cost information to support the contention that the costs presented are too low." 41 Fed. Reg. 57800, 57803 (Dec. 9, 1976). See also 40 Fed. Reg. 57770, 57776 (Dec. 1, 1975).



In 1977, EPA rethought the matter and proposed to adopt FDF variances for future pretreatment standards. 42 Fed. Reg. 6476, 6497 (Feb. 2, 1977). It never notified Congress of its potential change of heart, nor did it resolve the matter at any time during 1977 when EPA's new policy could have been brought to the attention of Congress.<sup>40</sup> Instead, EPA continued to deliberate until mid-1978, when it first announced that it would allow industry to obtain FDF variances from all pretreatment standards.<sup>41</sup> Shortly thereafter, EPA proposed to establish FDF variances from BAT standards also,<sup>42</sup> a proposal that was not adopted until mid-1979.<sup>43</sup>

EPA surely can't argue that Congress ratified its proposed rule, for this would amount to adopting an agency's thinking before the agency had itself completed or committed to the thought. Instead, EPA asks this Court to infer that Congress, by its silence, ratified FDF variances for pretreatment standards even though the agency had never mentioned such a variance to Congress; no source had ever applied for a pretreatment variance; the variance did not exist in any pretreatment rule or regulation of the agency; and the only regulations then on the books distinguished between BPT limits, where the variance was allowed, and pretreatment and BAT standards, where it was not. The argument is absurd on its face. If Congress ratified any practice in 1977, it was the absence, not the presence, of an FDF variance for pretreatment and BAT standards.

**4. FDF variances for toxic pretreatment standards are not reasonable given the purposes of the Clean Water Act.**

a. Lacking a compelling legal argument, EPA turns to policy, alleging first that an FDF variance serves a different purpose than a Section 301(c) variance. Put simply, this argument supposes that an FDF variance is not a "variance"

<sup>40</sup> As noted earlier, the agency's testimony before Congress never referred to the FDF variance. 1977 *Legis. Hist.*, *supra*, at 1085-1139, 1399-1472.

<sup>41</sup> 43 Fed. Reg. 27736, 27737 (June 26, 1978).

<sup>42</sup> 43 Fed. Reg. 37078, 37088, 37132 - 37134 (Aug. 21, 1978).

<sup>43</sup> 44 Fed. Reg. 32854, 32893 - 32894, 32930 - 32931 (June 7, 1979).

at all, but rather a part of the standard-setting process in which EPA corrects prior errors. An FDF variance simply sets a BAT or pretreatment standard for an individual plant, says EPA, while a Section 301(c) variance excuses compliance with a requirement applicable to the larger class of dischargers.

This is a distinction without a difference. In *National Crushed Stone Assn.*, 449 U.S. at 74, this Court found that a Section 301(c) variance performs the precise role EPA ascribes to an FDF variance: it "creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class."<sup>44</sup>

Section 301(c) is a reexamination of BAT factors for an individual source. It does not matter whether the reexamination is triggered because an individual source is simply a more marginal operation than others in the same industry or because the factors that determine BAT (*i.e.*, raw waste load, discharge volume, energy requirements, age, process configuration) at a single plant are sufficiently different that the cost of achieving BAT-level performance is no longer affordable. In either case, Congress said there could be no escape from uniform BAT requirements for toxics because of inability to pay for available controls. It would be ironic indeed for Congress to have permitted the same result by reexamination of the factors contributing to a source's economic difficulty. Both FDF and Section 301(c) variances set either a new BAT or pretreatment standard for a single source. Both excuse the source from an otherwise applicable national standard. The

<sup>44</sup> EPA focuses on this Court's discussion of the different eligibility criteria for each variance: Section 301(c) asks whether a modification "will represent the maximum use of technology within the economic capability of the owner or operator."<sup>45</sup> 33 U.S.C. 1311(c), while an FDF variance addresses the statutory factors relevant to BPT. 449 U.S. at 78. This distinction does not, however, invalidate the Court's statement that the two variances serve the same purpose; it simply underscores the fact that BPT and BAT limits differ. As this Court explained, the Section 301(c) factors bear a substantial relationship to the considerations underlying BAT; they would, however, be inapposite in the BPT context because they would not apply the general requirements to an individual point source. *Id.* at 73.

two serve the identical function. It makes no sense to assume that Congress prohibited one, and not the other, for toxics.

b. EPA next claims that an FDF variance is "substantively indistinguishable" from either subcategorizing an industry during the rulemaking or revising a final rule. (EPA Br. 35-36). EPA mixes apples and oranges. Procedure aside, there are two striking differences between establishing special categories for a group of plants within a larger industrial category *before* issuing a rule and granting individual plant variances from a final standard. The first lies in the scope of the decision; the second, in its timing.

EPA here characterizes the FDF variance as a standard for either a plant or a group of plants (and thus akin to a subcategory), but the rule is actually designed for a single "Industrial User within \*\*\* [a] subcategory." 40 C.F.R. 403.13(b). (Pet. App. A122). It seeks data specific to the industrial variance applicant without regard to whether or not there are other similarly situated sources within the subcategory. It does not appear to recognize any connection between the information produced in the variance proceeding and the control requirements of the larger industrial category. If, for example, a variance requires more stringent controls for a particular facility (there have never been any such variance requests although EPA maintains their theoretical possibility), the rules do not seem to require EPA to decide whether to order further process changes in other sources or otherwise upgrade the standards to the level of this "best performer." The FDF variance is, in essence, a single plant evaluation designed primarily to waive control requirements for a single source.

Congress gave EPA some discretion to differentiate among sources within a category—it recognized, for example, the possibility of a "subcategory." 1977 *Legis. Hist.*, *supra*, at 435—but not without limit. It did not give EPA carte blanche to entertain single plant evaluations. Congress wanted to avoid hobbling the standard-setting process with atypical concerns:

[T]he pretreatment standards \*\*\* [should] be national in scope and addressed to the most significant pre-

treatment problems. The Committee expects that the standards would vary with the broad type of treatment processes used, but the Committee does not intend that each individual treatment works would have its pretreatment standards set up by the Administrator.

1972 *Legis. Hist.*, *supra*, at 800.

Pretreatment standards set control requirements for indirect dischargers comparable to BAT for direct sources. 1977 *Legis. Hist.*, *supra*, 271, 342-343, 403, 461, 690-691. Thus, EPA should weigh the factors relevant to pretreatment standards, like those for BAT, only across whole industrial classes or categories:

The Conferees intend that the factors described in section 304(b) be considered *only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class. Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible.*

1972 *Legis. Hist.*, *supra*, at 172 (emphasis added).

Congress expressly cautioned against single plant evaluations:

The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.

Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided.

*Id.* at 235. (emphasis added).

This caution took on added importance in the context of

BAT because Congress intended BAT to be more technology-forcing than BPT. 1972 *Legis. Hist.*, *supra*, at 170, 144. BPT was geared to "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." *Id.* at 169. Congress pegged BAT, by contrast, to "the best performer in any industrial category." *Id.* at 170.

It stands to reason that, in coming up to the level of the best performer in a category, individual plants might incur costs, energy requirements, or process disruptions wholly out of proportion to others, especially where local officials had previously required little pretreatment. Congress recognized that some plants might close, not just because they were less able to pay for pollution controls than others, but also because they would be required to make more "significant advancements in their levels of pretreatment" than others within the same industry. 1977 *Legis. Hist.*, *supra*, at 404.

Congress did not authorize less stringent standards for these plants (except for Section 301(c) variances for nonpoint-source). For toxic pretreatment standards, it insisted on state-of-the-art technology, suggesting other options such as removal credits or municipal pretreatment to shift the burden of control where feasible. *Id.* at 404-405. It remained, however, steadfast in its goal: "to prevent, to the maximum extent feasible, the industrial pollutants from entering the [municipal sewage treatment] plant in the first place." *Id.* at 405.

An FDF variance has no place in this technology-forcing scheme because it allows some sources to escape "best performance" levels for reasons that have nothing to do with what technology can achieve. For example, one strong indication that EPA has gone awry in transferring the FDF variance from the BPT to the pretreatment and BAT contexts lies in the agency's treatment of the cost factor. EPA told sources they could request an FDF variance for a "removal cost \*\*\* wholly out of proportion to the removal cost considered during development of the Standards \*\*\*." 40 C.F.R. 403.13(c)(2)(iv)(A)(P)(i). App. A123 (emphasis added). EPA took this language virtually intact from BPT standard-setting where Congress told EPA to do a "limited cost-benefit

analysis" to ascertain whether "the additional degree of effluent reduction is wholly out of proportion to the costs \*\*\*." 1972 *Legis. Hist.*, *supra*, at 170, (emphasis added). Where costs are significantly greater than normal, the cost-benefit calculus for BPT changes.

For BAT and pretreatment, however, Congress adopted an entirely different cost test: "what is 'economically achievable' should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology—without regard to costs." *Id.* (emphasis added). EPA has consistently defined BAT as that technology which is affordable across a whole industrial category. Comparative costs are not relevant to this inquiry.<sup>8</sup> Hence, EPA's FDF variance rules are out of place in the BAT context.

A second critical difference between the FDF variance and subcategorizing during a rulemaking is the timing of the decision on pollution control requirements. Here Congress left EPA no discretion. Congress wanted industry's pollution control obligations defined quickly. It gave EPA only nine months to set pretreatment standards.<sup>9</sup> It gave industry no more than three years from the date of promulgation to comply. Section 307(b), 33 U.S.C. 1317(b).

If sources are to meet this timetable, they have to embark at once on all the steps necessary to attain compliance—preliminary engineering, obtaining bids, awarding construction contracts, purchasing major equipment components, construction, trial operation, performance testing, and fine-tuning. The advanced technology required by these standards is, after all, hardly an off-the-shelf consumer item.

An FDF variance is antithetical to this timetable. FDF variance applicants must wait close to a year in the best of cases—considerably more on the average—to know their

<sup>8</sup> By contrast, comparative costs—both among industries and between industries and municipalities—are relevant to "best conventional pollution control technology" requirements. 1977 *Legis. Hist.*, *supra*, at 428, but there is no economic capability waiver from these requirements. *Id.* at 431.

<sup>9</sup> This deadline has been extended by the district court on several occasions, see e.g., *supra*.



pollution control obligations.<sup>9</sup> If they wait for the variance to be resolved, they will miss the compliance deadline. If they do not wait, the variance is purely illusory. Nothing could be further from the scheme Congress had in mind.

An FDF variance is closer in timing to amendment or revision of a rule—at least each takes place after the rule is issued. They are not, however, “substantively indistinguishable.” Because amendments or revisions are designed to effect changes in a rule, they are subject to the same constraints on the initial rulemaking; that is, they must address classes and categories of sources, not single plants.

Revisions also differ procedurally. The Clean Water Act requires EPA to revise its rules following the same streamlined, informal rulemaking procedures used to set pretreatment standards in the first place. Section 507(b)(1), 33 U.S.C. 1317(b)(1). Congress wanted quick, direct, and uniform corrections to erroneous or outdated rules.<sup>10</sup> The FDF variance, by contrast, is a *Rube Goldberg* contraption. It may entail review by as many as four separate tiers of government,<sup>11</sup> an

<sup>9</sup> EPA's FDF variance rules outline the following minimal procedures: 30 days from the effective date of the standard (except if a “category determination request” is made) to apply for a variance; an unspecified amount of time for the agency to review the application, set the administrative machinery in motion, and notify the public that an application is pending; at least 30 days for public comment on the application; and an unspecified amount of time for either the State or the EPA regional enforcement division director to weigh the public comments and decide the request. If the request is denied, the following additional procedures may be invoked: 30 days to request a hearing from the Regional Administrator, once again unspecified time for the Regional Administrator to review the enforcement division director's decision and determine whether to hold a hearing, 30 days to appeal to the Administrator (apparently only if the hearing request is denied), additional time for the hearing itself, and an unspecified amount of time for either the Regional Administrator or the Administrator to render a decision. 40 C.F.R. 403.13(g) and (j) to (m) (Per. App. A122-A127).

<sup>10</sup> For example, sources have only 30 days to ask a court to remand an erroneous EPA rule, unless they can show that their challenge is based on information arising after 30 days. Section 509(b)(1), 33 U.S.C. 1369(b)(1).

<sup>11</sup> An application is reviewed by the state, the EPA Enforcement Division Director, the EPA Regional Administrator and the EPA Administrator. 40 C.F.R. 403.13 (Per. App. A122).

informal public comment period, a hearing, and coordination between EPA's rulemaking experts and diffuse state and regional office personnel. (See procedures described in n. 50, *supra*). Not surprisingly, the process has proved extraordinarily slow of resolution.<sup>12</sup>

EPA scoffs at this procedural issue, shielding its inept handling of FDF variance applications behind *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). EPA claims that, according to *Vermont Yankee*, an agency is free to choose its own rulemaking procedures. CMA cites *SEC v. Chenery*, 332 U.S. 194 (1947) for the same general proposition. Petitioners take both *Vermont Yankee* and *Chenery* too far. These cases are irrelevant where, as here, Congress has made the choice for EPA.

c. EPA also pleads that it needs an FDF variance because its final pretreatment standards may not always reflect the full range of factors the Administrator was supposed to consider. (EPA Br. 31). This could occur in one of three situations: when EPA overlooks information in its possession, when it is ignorant of information available to industry, or when relevant information is simply unavailable at the time of rulemaking.

The first situation occurs when EPA errs: it simply fails to consider information presented to it in a rulemaking. EPA cites two such cases in its brief. In *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979), EPA fell back

<sup>12</sup> EPA fabricates an inconsistency in NRDC's position on FDF variance procedures, alleging that NRDC wavers between calling the procedures too summary and too slow. (EPA Br. 36 and 34-35, n.26). EPA swings at its own straw man. See Transcript of Oral Argument in Court of Appeals at 19. NRDC has never said EPA would—or should—issue variances without public notice; it has simply said, correctly, that EPA's public notice procedures for FDF variances are laxer than those required for setting pretreatment standards because proposed variances need not be published in the Federal Register as proposed rules must clearly be. 5 U.S.C. 553. Thus, the notice procedures illustrate one more deviation from the route Congress mapped out for the agency. Whichever approach to public notice EPA takes, however, the reality remains that an after-the-fact definition of pollution control requirements is both slower and more cumbersome than what Congress had in mind.



on the FDF variance when confronted with countervailing factors which it had been "fully aware of" for nearly two years before completing the rulemaking. 43 Fed. Reg. 29771 (1978).<sup>14</sup> Likewise, in *American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1061 (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978), EPA preferred the FDF variance in response to industry criticism of its data base, even though the flaw at issue had been clearly pointed out to EPA during the rulemaking. 39 Fed. Reg. 24114, 24115 (1974)(discussing sinter plants).<sup>15</sup>

In these situations, the FDF variance is nothing more than a fig leaf for inadequate agency rulemaking. This Court need not sanction such obviously flawed rulemaking. Congress wanted EPA to do an adequate job during rulemaking.<sup>16</sup> It told EPA to be "precise" with effluent guidelines so that effluent limits would be uniform and, hence, universally applicable. 1972 *Legis. Hist.*, *supra*, at 172, 309. The FDF variance thwarts this scheme.

In addition, reliance on the so-called "safety valve" of the FDF variance makes EPA's rules more, not less, vulnerable to challenge. EPA, in effect, puts its eggs in a basket it doesn't control. If a source contests the pretreatment standards on the merits rather than in a variance proceeding, EPA runs the risk that its rules will be overturned for failure to respond to relevant rulemaking comments. See, e.g., *Portland Cement Ass'n. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974), reh. denied, 423 U.S. 1092 (1976). The weight of each rulemaking comment turns on its

<sup>14</sup> This flaw did not prove critical. *Kennecott* upheld the BPT standards, relying in large part, on the statutory obligation to base effluent guidelines on the "best plant," rather than on the availability of the FDF variance as a safety valve. 612 F.2d at 1243.

<sup>15</sup> *AISI* accepted the adequacy of the FDF variance as a safety valve for this error in the BPT rules. *AISI* did not address FDF variances from BAT standards as the BAT rules at issue in *AISI* did not contain an FDF variance clause. 39 Fed. Reg. 24114-24130 (1974). Nor did *AISI* address Section 301(i), which it predated.

<sup>16</sup> Senator Muskie, for example, explained: "[T]here are no waivers or modifications \*\*\*. An adequate consideration of costs is made at the time of promulgation of the effluent guidelines". 1977 *Legis. Hist.*, *supra*, at 658.

validity, not on whether it is supported by few or many sources. Hence, it is far safer for EPA to be careful during, not after, the rulemaking.

A second type of error occurs when industry fails to bring relevant information to EPA's attention during a rulemaking. An FDF variance does not cure this type of error; it abets it. The variance gives industry an incentive to treat the rulemaking more casually. If a company fails to produce relevant information, it will have a second bite at the apple in a variance proceeding. Without the variance, industry must come forward with all relevant information during a rulemaking. Where it fails to do so, the courts will not entertain a challenge to the rule. E.g., *Kennecott and AISI*.<sup>17</sup> In addition, EPA is not totally at industry's mercy. Congress gave EPA broad authority to obtain from industry whatever information it needs to issue pretreatment standards. Section 308, 33 U.S.C. 1318.

Finally, EPA can issue rules which become dated in the wake of new information. EPA does not need an FDF variance for these situations either. As EPA concedes, it already has authority—indeed, is required—to revise its rules when this occurs. Section 307(b)(2), 33 U.S.C. 1317(b)(2). In short, the FDF variance is at best useless and at worst positively detrimental to EPA's overall standard-setting effort.

d. EPA also claims that the Third Circuit's decision could disrupt implementation of the Act. It might, says EPA, endanger existing regulations, presumably because some companies will try to reopen rules issued in partial reliance on the availability of an FDF variance as a safety valve. (EPA Br. 37). There will, however, be few, if any, opportunities to do so. EPA's rules required plants to apply for their variance within 180 days of the effective date of a pretreatment standard. (Pet. App. A122, A124). By September 1983, the date of the Third Circuit's decision, only 12 companies had

<sup>17</sup> Both *Kennecott* and *AISI* rejected industry challenges based on information not presented to EPA during the rulemaking (e.g., ferrocyanide formation, 612 F.2d at 1245; water scarcity, 526 F.2d at 1050; and engineering factors, 526 F.2d at 1049).

met the FDF variance application deadline.<sup>39</sup> These companies can still take advantage of any relevant information which could not have been brought to EPA's attention during the rulemaking. Section 509(b)(1), 33 U.S.C. 1369(b)(1).<sup>40</sup> The FDF variance, by contrast, could prove very disruptive since CMA forecasts that some companies will apply well beyond the 180 day application deadline in EPA's current rules—indeed, well after the deadline for complying with the applicable pretreatment standard. (CMA Br. 38, n.62).

EPA also claims that it may have to delay issuing future standards if it cannot rely on the FDF variance as a safety valve. (EPA Br. 37-38). This, too, is hyperbole. Since the Third Circuit's decision, EPA has issued six final<sup>41</sup> and four proposed pretreatment standards.<sup>42</sup> All were issued on or about the agency's deadline (*i.e.*, the date established in the Consent Decree).<sup>43</sup> Since EPA has apparently had no problem

<sup>39</sup> The filing deadline had expired for ten of thirteen pretreatment standards issued after EPA created the variance. These standards covered 11,316 (83%) of the 13,696 sources subject to categorical pretreatment standards. Of the 12 variance applicants, one company requested variances for two plants; another, for 24 plants. (Br. in Opp. App. A5-A7).

<sup>40</sup> An FDF variance is not subject to this restriction; it can cover any facts, including those which could easily have been brought to EPA's attention during a rulemaking. However, no useful purpose would be served—indeed it would delay enforcement of this program—to allow sources to raise new excuses for noncompliance from final rules. The restriction is therefore both wise and equitable, even as applied to the 12 companies possibly affected by the Third Circuit's decision.

<sup>41</sup> 40 Fed. Reg. 49126-49171 (Oct. 24, 1975) (aluminum forming); 40 Fed. Reg. 49838-49851 (Oct. 27, 1975) (pharmaceutical manufacturing); 40 Fed. Reg. 52380-52400 (Nov. 17, 1975) (coil coating); 40 Fed. Reg. 55990-55705 (Dec. 14, 1975) (electrical and electronic components); 40 Fed. Reg. 6742-6831 (Mar. 8, 1976) (nonferrous metals manufacturing); 40 Fed. Reg. 9108-9152 (Mar. 9, 1976) (textile manufacturing).

<sup>42</sup> 40 Fed. Reg. 49408-49416 (Oct. 25, 1975) (inorganic chemicals manufacturing); 40 Fed. Reg. 5862-5883 (Feb. 15, 1976) (plastics molding); 40 Fed. Reg. 8112-8182 (Mar. 5, 1976) (nonferrous metals and iron and steel/copper/aluminum, metal power production and powder metallurgy); 40 Fed. Reg. 26352-26403 (June 27, 1976) (nonferrous metals manufacturing).

<sup>43</sup> EPA's deadlines are embodied in a consent decree entered into with NRDC and approved by the district court in 1976. See n. 5, *supra*. Administrator Ruckelshaus signed all of the above-referenced standards within a month of this deadline and all but two within a week of the deadline. The standards appeared in the Federal Register shortly thereafter.

issuing rules in the absence of an FDF variance, there is no reason to believe it will develop a problem in the future. EPA has not, for example, had a problem issuing either new source performance standards or new source pretreatment standards, yet neither are eligible for an FDF variance.

Moreover, since few indirect dischargers avail themselves of the FDF variance, incorporating their concerns in the national rulemaking will not significantly burden EPA. This does not add a new feature to EPA rulemaking; EPA routinely considers unique features of individual plants in rulemaking for both direct and indirect dischargers, notwithstanding its desire to focus on the more "typical" plants. (EPA Br. 37). Indeed, requests to establish separate subcategories for one or a few plants which are somehow "different" from others in the same industrial category are a common feature of these rulemakings.<sup>44</sup> Eliminating the FDF variance simply closes off another avenue for raising the same concerns. It frees EPA to concentrate its resources on rulemaking, rather than dispersing them throughout variance proceedings and litigation over variance applications.

c. There are sound policy reasons for avoiding FDF variances. Understanding what makes one plant's performance different from others may be a key to improving the performance of all. Thus, considering this issue in the rulemaking may actually enhance the technology-forcing nature of the standard.

In addition, it is far more efficient to decide whether plants are different or similar to the rest of an industrial

<sup>44</sup> See, e.g., *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 808 n.10 (9th Cir. 1979) (subcategories divided for analytical purposes into subdivisions of one, two, or three plants); *Kennecott Copper Corp.*, 612 F.2d at 1246 (subcategorization of two mills was arbitrary); *American Iron and Steel Institute*, 526 F.2d at 1070-1071 (addressed sole plant in country with water supply problem). Indeed, subcategorization has been one of the most frequently disputed issues in litigation over EPA's effluent limitations. Report of the Effluent Standards and Water Quality Information Advisory Committee, reprinted in *Implementation of the Federal Water Pollution Control Act, Hearings Before the Subcommittee on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 197-208 (1976).



category during, not after, a rulemaking. During the rulemaking, the standard-setters can frame the options for decision when the data base is still fresh before them. By contrast, EPA's FDF variance procedures require state and regional enforcement personnel to make the same decisions on the basis of a rulemaking record which is unfamiliar to them. Their decisions, in turn, may be reviewed by the EPA regional office (if a state makes the decision), the Regional Administrator, or the Administrator. This, at best, duplicates efforts, wasting scarce agency resources. It also prolongs the period of uncertainty over pollution control obligations.

Experience with BPT requirements shows that once a plant files an FDF variance application, it enters a regulatory limbo. Plants which applied for an FDF variance from BPT requirements before 1980 are still awaiting EPA's decision.<sup>10</sup> Some of these applications date to 1976 and 1977. As long as EPA demurs, the applicants are unwilling to make the required capital expenditures for pollution controls. This creates inequity within regulated industries since companies which postpone pollution control expenditures gain a competitive edge over those which pay to install, operate, and maintain controls. Yet Section 301 was added to the law for the very purpose of eliminating such economic disparities. 1972 *Legis. Hist.*, *supra*, at 156.

Experience also shows that many variance applications lack merit,<sup>11</sup> a fact that weighed heavily with Congress.<sup>12</sup> Yet variance applications delay enforcement efforts. Congress rejected a proposal for case-by-case administrative extensions of the 1977 BPT deadline for this very reason. At the end of EPA's decision-making process, those denied a variance would "almost certainly" appeal to the courts. Congress

<sup>10</sup> Variance applications 74-08, 77-08, 77-14, 77-15, 77-16, 77-19, 78-02, 78-05, and 78-07 are still pending, according to EPA's June 29, 1984 status report.

<sup>11</sup> *E.g.*, EPA approved only four of the 13 BPT variance applications. Fourteen were denied, 18 withdrawn. The rest are still pending. 1983 *Report*, *supra*, at 740.

<sup>12</sup> Congress repeatedly expressed the fear that variances would be pursued by unqualified sources in order to buy time for compliance. See, *e.g.*, 1977 *Legis. Hist.*, *supra*, at 472, 483-484, 485, 487, 488.

reopened, perhaps obtaining a stay of the applicable requirements. This, in turn, would mean that "these discharges would continue unabated until final judicial resolution, first of the variance, and then, if necessary, of the ensuing enforcement order." 1977 *Legis. Hist.*, *supra*, at 486-487.<sup>13</sup> Indeed, Congress took a dim view of variances altogether:

The conferees are aware of the administrative and judicial implications of modifications of a law as complex as the Clean Water Act. There was only one exception provided in the 1972 act and in that case, there had been great abuse. More than 100 steam electric powerplants applied for modification of thermal effluent limits. None have yet been placed on a compliance schedule to meet effluent limitations because of extensive delay as a result of this exception. And there is little question that after the administrative process there will be extensive litigation. Heat has become an unregulated pollutant, clearly not the intent of Congress. The Congress intended that there be a very limited waiver \*\*\*. That limited exception has been turned into a gaping loophole.

*Id.* at 476-477, 641-642, 467. It therefore carefully circumscribed, through Section 301(h), the availability of variances where toxic pollutants are concerned.

Petitioners' construction of the Act ignores the clear language of Section 301(h), is inconsistent with the overall statutory scheme for strict control of toxics, and would give a handful of companies an unfair competitive advantage over the thousands of sources now embarking on a pollution control program. The Third Circuit correctly rejected it.

<sup>13</sup> EPA claims it is inconsistent to say that variances delay compliance even though few companies apply. (EPA Br. 17, n.26). There is no inconsistency. The fact that a source is subject to a permanent standard means that it is, by definition, a "significant" environmental problem. 1972 *Legis. Hist.*, *supra*, at 488. When that source delays compliance, it thwarts Congress's overall scheme for strict toxics control and gains a competitive advantage over others in the same industry who comply with the law.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 20, 1984

**APPENDIX**



## CLEAN WATER ACT PROVISIONS

### 1. Section 208(b)(2)(C) of the Clean Water Act, as amended, 33 U.S.C. 1288(b)(2)(C):

(2) Any plan prepared under such process shall include, but not be limited to—

• • •

(C) the establishment of a regulatory program to—

(i) implement the waste treatment management requirements of section 201(c),

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial waste discharged into any treatment works in such area meet applicable pretreatment requirements.

### 2. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. 1311(c):

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

### 3. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(g):

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

### 4. Section 301(h) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(h):

(h) The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures

protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under title II of this Act will be used to achieve the degree of effluent reduction required by section 201(b) and (g)(2)(A) or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act.

**5. Section 301(i) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(i):**

(i)(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time

required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable

to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1983; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements to subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act, and the publicly owned treatment works to accept the discharge from the point source; and (iii)

the permit for such point source requires point source to meet all requirements under section 307(a) and (b) during the period of such time modification.

**6. Section 301(j) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(j):**

(j)(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than 270 days after the date of enactment of the Clean Water Act of 1977;

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 or not later than 270 days after the date of enactment of the Clean Water Act of 1977, whichever is later.

(2) Any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

**7. Section 304(f)(1) of the Clean Water Act, 33 U.S.C. 1314(f)(1) (1972):**

(f)(1) For the purpose of assisting States in carrying out programs under section 402 of this Act, the Administrator shall publish, within one hundred and twenty days after the date of enactment of this title, and review at least annually



thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

**8. Section 306(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1316(b)(1):**

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

- pulp and paper mills;
- paperboard, builders paper and board mills;
- meat product and rendering processing;
- dairy product processing;
- grain mills;
- canned and preserved fruits and vegetables processing;
- canned and preserved seafood processing;
- sugar processing;
- textile mills;
- cement manufacturing;
- feedlots;
- electroplating;
- organic chemicals manufacturing;
- inorganic chemicals manufacturing;
- plastic and synthetic materials manufacturing;
- soap and detergent manufacturing;
- fertilizer manufacturing;
- petroleum refining;
- iron and steel manufacturing;
- nonferrous metals manufacturing;

- phosphate manufacturing;
- steam electric powerplants;
- ferroalloy manufacturing;
- leather tanning and finishing;
- glass and asbestos manufacturing;
- rubber processing; and
- timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

**9. Section 306(e) of the Clean Water Act, as amended, 33 U.S.C. 1316(e):**

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.



**10. Section 307(a) of the Clean Water Act, as amended, 33 U.S.C. (& Supp. V) 1317(a):**

Sec. 307(a)(1) On and after the date of enactment of the Clean Water Act of 1977, the list of toxic pollutants or combination of pollutants subject to this Act shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after the date of enactment of the Clean Water Act of 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with section 301(b)(2)(A) and 304 (b)(2) of this Act. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected orga-

nisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standards (or prohibition) with such modifications as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 301(b)(2)(A) and 304(b)(2) for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after the date of enactment of the Clean Water Act of 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

**11. Section 307(d) of the Clean Water Act, as amended, 33 U.S.C. 1317(d):**

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

**12. Section 308(a) and (b) of the Clean Water Act, as amended, 33 U.S.C. 1318(a) and (b):**

(a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting

in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), and 504 of this Act—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator

shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act.

**13. Section 501(a) of the Clean Water Act, as amended, 33 U.S.C. 1361(a):**

Sec. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

**14. Section 509(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1369(b)(1):**

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.



**AMICUS CURIAE**

**BRIEF**



**MOTION FILED**

**AUG 20 1984**

**Nos. 83-1013 and 83-1373**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,  
*Respondents;*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,  
*Respondents.*

On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND  
BRIEF FOR AMICUS CURIAE  
SOUTHEASTERN FISHERIES ASSOCIATION, INC.

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August 1984

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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**No. 83-1013**

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**On Writs of Certiorari to the United States  
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**MOTION OF THE SOUTHEASTERN FISHERIES  
ASSOCIATION, INC.  
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

a. The Southeastern Fisheries Association, Inc. ("SFA") hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents, pursuant to Supreme Court Rule

36.3. Petitioner Environmental Protection Agency ("EPA") and Respondent Natural Resources Defense Council, Inc. have consented to the filing of this brief. Their consent letters have been filed with the Clerk of this Court. The consent of Petitioner Chemical Manufacturers Association could not be obtained.

SFA is one of the oldest and largest commercial fisheries trade associations in the Southeastern United States. Organized in 1952 under the laws of the State of Florida, it is headquartered in Tallahassee, Florida. SFA has more than 400 members in all sectors of the commercial fishing industry from North Carolina to Texas. In addition to those directly involved in harvesting fishery resources, its members include processors, dealers, distributors, and suppliers to the fishing industry.

The Gulf and South Atlantic fisheries are among the Nation's most valuable. Shrimp, the major species from the region, is the highest value catch in the country, with landings in 1983 valued at approximately \$486 million.<sup>1</sup> The total national economic impact of the South Atlantic and Gulf of Mexico commercial fisheries, including direct and indirect sales, was over \$6 billion in 1980. Income related to this economic activity resulted in 142,854 person-years of employment.<sup>2</sup>

Protection of coastal waters and estuarine habitat is critical to the livelihood of SFA's members. Over 90 percent of the commercial fishery resources in the Southeastern United States is estuarine-dependent. Degradation of the Nation's marine and coastal waters could not only lead to decline in the overall productivity of the Gulf and South Atlantic fisheries, but to a decline in quality of fishery products, with substantial adverse effects on the economics of the industry.

<sup>1</sup> U.S. Department of Commerce, National Marine Fisheries Service, Fisheries of the United States, 1983, p. 11 (April 1984).

<sup>2</sup> Contour Associates, Inc., Economic Impact of the Commercial Fishing Industry in the Gulf of Mexico and South Atlantic Region, p. 130 (Feb. 1984).

b. This case involves whether the Third Circuit correctly ruled that Section 301(l) of the Clean Water Act<sup>3</sup> precludes industrial facilities from increasing their discharges of toxic pollutants over those allowed in uniform national pretreatment standards by obtaining a "fundamentally different factor" variance. *National Association of Metal Finishers v. EPA*, 719 F.2d 624, 645-646 (3d Cir. 1983).

The discharge of toxic pollutants into the Nation's marine waters and estuaries is of special concern to SFA because of the threats posed by toxics to fisheries. Toxic pollutants, such as mercury and lead, are known to harm reproduction of aquatic species, including shrimp and oysters. These pollutants, and others such as copper and PCB's, bioconcentrate in the food chain, where commercial fish and shellfish are near the top. Bioconcentration over time can render valuable species, such as tuna and swordfish, unfit for human consumption.<sup>4</sup>

There are, of course, numerous industrial facilities in the Southeast which discharge, both directly or indirectly through publicly owned treatment works, into the waters on which SFA members depend for their livelihood. Variances have already been sought for plants located in the Gulf Coast states, including chemical, fertilizer, and electroplating facilities. Moreover, pretreatment standards have yet to be issued, or were recently issued, for several of the major industries with the potential to affect SFA members, including over 200 organic chemical or plastics manufacturers concentrated in Texas, Louisiana, Alabama, Florida, and Mississippi, and numerous petroleum refineries located along the Gulf. If the Third Circuit is reversed, and it is held that EPA has the power to grant variances, each of these facilities would be potentially eligible to dump more toxic pollutants into the fisheries than are allowed by the uniform national standards.

In sum, SFA and its members have a keen interest in

<sup>3</sup> 33 U.S.C. §1311(l).

<sup>4</sup> See generally Environmental Protection Agency, Ambient Water Quality Criteria for Copper, B-10, 12; Ambient Water Quality for Mercury, B-6, 7, C-20, 21; Ambient Water Quality for Lead, B-9; Ambient Water Quality for Polychlorinated Biphenyls, B-6 (EPA Series 440/5-80, October 1980).

assuring that the Clean Water Act is properly implemented to reduce toxic pollutant discharges into the waters of the Southeastern United States. This special interest in the protection of fishery resources and habitat is not represented in this proceeding.

Respectfully submitted,

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*Respondents.*

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**On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit**

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**BRIEF FOR AMICUS CURIAE  
SOUTHEASTERN FISHERIES ASSOCIATION, INC.**

**STATEMENT OF INTEREST OF AMICUS CURIAE**

The Southeastern Fisheries Association, Inc. ("SFA") respectfully refers this Court to the foregoing Motion for

Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding. This brief is filed in support of Respondents.

## INTRODUCTION

This case reviews a decision by the Third Circuit holding that Section 301(l) of the Clean Water Act<sup>1</sup> bars the Environmental Protection Agency from granting "fundamentally different factor" ("FDF") variances from uniform national pretreatment standards for toxic pollutants. The foundation of the Third Circuit's decision was its view that a key purpose of the 1977 Amendments to the Clean Water Act, as evidenced by the legislative history, was to crack down on the discharge of toxic pollutants. *National Association of Metal Finishers v. EPA*, 719 F.2d 624, 645-646 (3d Cir. 1983).

More specifically, the threat to the Nation's fisheries played a major role in persuading Congress to spotlight toxics control in the 1977 Amendments. During the Senate debate, Senator Muskie, the principal author of the toxics control provisions, focused on fish kills and the presence of toxics in the aquatic environment. He warned that "concentrations of one or more of the heavy metals commonly exceeded suggested safe limits in the water column or in fish tissue at 17 sites," or 41 percent of those surveyed.<sup>2</sup>

Similarly, in discussing the Conference Report on the floor of the House, Congressman Roberts, the floor manager, emphasized that toxic pollutants not only "destroyed both commercial and sport fishing, but in many major water bodies they also constitute a hazard to aquatic environment and public health that has yet to be fully recognized." 1977 Legis. Hist. at 327.

<sup>1</sup> 33 U.S.C. §1311(l).

<sup>2</sup> See A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess., 863-864 (1978) (hereafter cited as "1977 Legis. Hist.").

## ARGUMENT

### THE CLEAN WATER ACT, AND PARTICULARLY THE 1977 AMENDMENTS, WERE DESIGNED TO RID THE NATION'S WATERS OF TOXIC POLLUTANTS, AND SHOULD BE CONSTRUED TO FOSTER THIS PURPOSE

From the outset, the Clean Water Act established a "national policy that the discharge of toxic pollutants in toxic amounts be prohibited. . . ." 33 U.S.C. §1251(a)(3). To achieve this goal, Congress initially established a separate procedure aimed at assuring more stringent effluent standards for toxic pollutants, and required that these toxic standards "provide an ample margin of safety," 33 U.S.C. §1317(a)(4)—a directive not applicable to other pollutants.

Nevertheless, little progress had been made in regulating toxic pollutants by the time Congress reexamined the Clean Water Act in 1977.<sup>3</sup> This, combined with mounting evidence of the harm caused by toxic chemicals in the environment, prompted Congress to make stringent and effective control of toxics a centerpiece of the 1977 Amendments.

Congressman Roberts called the toxics provisions "the highlight of this bill," and underscored "the increasingly evident toxics hazard." 1977 Legis. Hist. at 326. Senator Muskie cautioned that "the seriousness of the toxics problem is just beginning to be understood," and that "the nature of the toxics problem is so pervasive that the most effective approach in dealing with it is on an industry-by-industry basis." *Id.* at 863. Finally, in signing the 1977 Amendments, President Carter praised the bill for emphasizing "the importance of controlling toxic pollutants which endanger the public health." *Id.* at 181.

The Third Circuit's decision was faithful to this legislative history. Indeed, the Court began its discussion of the meaning of §301(l) by observing that "the elimination of the discharge of toxic pollutants has always received special emphasis under

<sup>3</sup> See R. Hall, The Evolution and Implementation of EPA's Regulatory Programs to Control the Discharge of Toxic Pollutants, 10 Nat. Res. Law 507, 514-515 (1977).

the Act," and that "the discharge of toxic pollutants generated even greater Congressional concern in 1977." 719 F.2d at 645.

Ultimately, the Third Circuit ruled:

Given the clear congressional concern throughout the 1977 Amendments for discharges of toxic pollutants, we hold that the FDF variances for toxic pollutant discharges are forbidden by the Act.

719 F.2d at 646.

The overall purpose of the legislation is, of course, the appropriate context in which to examine the meaning of Section 301(l)'s ban on modifications of toxic pollutant requirements. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Weinberger v. Hynsan, Westcott, & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973).

EPA's reading of Section 301(l) flouts Congress' overriding purpose in enacting the 1977 Amendments. By contrast, the Third Circuit's ruling protects the aquatic environment and human health by compelling industrial dischargers to meet national uniform pretreatment standards without modification.

### CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be affirmed.

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August 1984

# **REPLY BRIEF**



11  
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OCTOBER TERM, 1984

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ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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In our opening brief (at 18-23), we argued that EPA is authorized under the Clean Water Act to grant "fundamentally different factors" (FDF) variances from the pretreatment standards applicable to indirect dischargers, as well as from the currently practicable BPT and the potentially more stringent BAT limitations that govern direct dischargers. Respondent answers, first, that this broad question is not before the Court and that the only

point in dispute is the meaning of Section 301(l) of the Act, 33 U.S.C. 1311(l). In the remainder of its brief, however, respondent repeatedly relies on the assertion that FDF variances are proper only in the case of BPT limitations. Resp. Br. 11-14, 24, 26-27, 34. As we explained in our opening brief (at 18-23), respondent's position is wrong and is contrary to *E.I. duPont de Nemours v. Train*, 430 U.S. 112 (1977), and *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980).

Contending that *duPont* and *National Crushed Stone* sanctioned FDF variances only in the case of BPT limitations, respondent maintains (Br. 12) that FDF variances are proper in that context because Congress did not create an applicable statutory variance. By contrast, respondent contends (Br. 12), FDF variances may not be granted from BAT limitations because "Congress created its own BAT variance in Section 301(c) of the Act \* \* \* and deemed this the sole deviation from otherwise uniform national standards."

If anything, this argument supports our position, rather than respondent's. Respondent appears to have forgotten that Section 301(c) modifications are not available for indirect dischargers.<sup>1</sup> Section 301(c) authorizes modifications of "the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977 \* \* \*" (emphasis added). Indirect dischargers are not subject to the permit program established under the Act; only direct dischargers apply for and obtain such permits.<sup>2</sup> Section

<sup>1</sup> Respondent incorrectly states (Br. 29 & n.41) that EPA has made Section 301(c) modifications available for pretreatment standards. The cited regulation dealt with BAT direct discharger requirements, not pretreatment standards. 40 Fed. Reg. 55770, 55776 (1975).

<sup>2</sup> Section 402 of the Act, 33 U.S.C. 1342, established the "National Pollutant Discharge Elimination System" (NPDES) permit program only for direct dischargers, including publicly owned treatment works (POTWs) to which indirect dischargers send their waste water. Effluent limitations guidelines are applied to

301(c) is therefore inapplicable on its face to indirect dischargers. Consequently, even if respondent were correct that FDF variances may not be granted from BAT direct discharger requirements due to the availability of Section 301(c) modifications,<sup>3</sup> that would not support respondent's argument that FDF variances may not be granted to indirect dischargers. On the contrary, FDF variances with respect to the pretreatment standards for indirect dischargers would be just as appropriate as FDF variances with respect to BPT limitations—a practice that respondent concedes was approved in *duPont*.<sup>4</sup>

Respondent relies (Br. 13-14) on *duPont*'s holding that FDF variances may not be granted from new source direct discharger requirements. Respondent contends that the reasons for this holding apply equally to pretreatment standards for existing sources. With two exceptions discussed below, all of respondent's arguments (Br. in Opp. 13) in this regard were addressed in our opening brief (at 20, 21 n.15, 22), and we will not repeat those points here. Respondent argues that both pretreatment standards and new source standards for direct dischargers, unlike BPT limitations, are intended to ensure national uniformity and maximum feasible control and to "force technology to the level of the best possible performer." Resp. Br. 13 & n.18. However,

direct dischargers through this permit program. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1975). Pretreatment standards, by contrast, apply directly to the indirect discharger without the issuance of any permit. See Pet. App. A17.

<sup>3</sup> As previously noted, we disagree with this argument.

<sup>4</sup> Respondent incorrectly asserts (Br. 24) that *duPont* "upheld" BAT rules that did not contain an FDF variance clause. In fact, the validity of the BAT regulations was not at issue in *duPont*.

Respondent also suggests (Br. 24) that in *duPont* this Court "appropriately assumed" that only Section 301(c) modifications, and not FDF variances, would be available for BAT regulations. Respondent does not, and cannot, point to anything in the opinion to support such a reading.



respondent's suggestion that BPT limitations are not intended to promote uniformity conflicts with *duPont's* holding (and with respondent's own decade-long insistence) that BPT no less than BAT requirements are to be established through national categorical regulations. The FDF variance does not conflict with the goal of uniformity in the BAT or pretreatment context any more than it does in the BPT context, where it has been explicitly upheld by this Court.

Respondent's reliance on the technology-forcing purposes of pretreatment, BAT, and new source requirements likewise is invalid. It is true that these requirements reflect the technological capabilities of the best performers within each subcategory. But, as we have explained (Gov't Br. 10-11, 30-31), the granting of an FDF variance signifies that the plant or plants in question constitute a separate subcategory and hence that the requirements for these plants are not properly determined by reference to the "best performer" in some other subcategory of the industry in question.<sup>5</sup> Consequently, granting FDF variances is not at odds with Congress's intent to improve the technology for industrial categories and subcategories.

Respondent draws an analogy (Br. 13-14) between new source direct dischargers (which may not obtain FDF variances) and all indirect dischargers. The more appropriate comparison is between new source direct and indirect dischargers (neither of which may obtain FDF variances) or between existing direct and indirect dischargers (both of which, in our view, are eligible for FDF variances). A new plant, whether a direct or in-

<sup>5</sup> Respondent also ignores the fact that, for many industries—as a result of a consent decree authored in relevant part by respondent—EPA is required to promulgate BPT-level pretreatment standards as an interim measure pending development of potentially more technology-forcing BAT-level standards. See *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2128 (D.D.C. 1976). The electropolishing pretreatment standards unsuccessfully challenged below were one such regulation.

direct discharger, can be designed to conform to the national rule and thus has no need for the FDF variance. See Gov't Br. 22-23. By contrast, an existing source, whether direct or indirect, does not have this flexibility, and the availability of FDF variances is therefore useful and important. *Ibid.*

## II.

A. Respondent next turns to the meaning of Section 301(l) of the Act, but respondent ignores the cardinal principle of statutory construction articulated by this Court in a similar context just last Term (*Chevron U.S.A., Inc. v. NRDC*, No. 82-905, (June 25, 1984), slip op. 4-5 (footnotes omitted)):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Here, respondent certainly ~~can~~ not show that its interpretation of Section 301(l) is supported by Congress's clear intent as evidenced by either the statutory language or the legislative history. Nor can respondent demonstrate that EPA's interpretation is impermissible. Accordingly, EPA's interpretation of the Act it administers must prevail.

B. Respondent begins (Br. 14-20) by contending that the plain language of Section 301(l) prohibits FDF var-

stances for toxic pollutants and that it is therefore unnecessary to look any further. Respondent's argument clearly lacks merit.

Section 301(f) provides that EPA may not "modify" any pretreatment standard or other requirement of Section 301 with respect to any toxic pollutant. In our opening brief (at 24-27), we pointed out that the statutory term "modify" may not be given its broad, literal meaning, *i.e.*, to change or alter, because Congress could not have intended to prohibit EPA from amending its regulations as warranted, and because such an interpretation would bring Section 301(f) into conflict with Section 307(b)(2), 33 U.S.C. 1317(b)(2), which commands EPA to "revise" its standards, including those for toxic pollutants (see 33 U.S.C. 1317(b)(1)), on a periodic basis.<sup>6</sup>

Respondent answers our argument (Br. 14-16) by maintaining that the term "modify" as used in Section 301(f)—unlike in other provisions of the Act (Br. 15)—signifies only a change in one direction: to "make more temperate and less extreme: lessen the severity of: moderate." Respondent seems to suggest that application of this definition gives Section 301(f) a reasonable meaning and eliminates any conflict with Section 307(b)(2). Respondent is wrong.

Under respondent's interpretation, Section 301(f) would still place severe and unlikely restrictions on EPA's ability to amend its own rules. Once EPA promulgated a limitation or standard for a toxic pollutant, EPA could not amend its rules to make that requirement "more temperate or less extreme." As we noted in our opening brief (at 25), neither the discovery of an error in the Agency's previous analysis, the compilation of better or more accurate data, nor subsequent scientific developments would

<sup>6</sup> EPA has not changed its position, regarding the interpretation of Section 301(f), as respondent contends (Br. 18). The Agency's position has always been straightforward—that an FDF variance is not a "modification" as Congress used that term in Section 301(f).

allow the Agency to change the standard. Unless Congress acted, the requirement could never be relaxed. Since Congress entrusted the EPA with the responsibility for issuing the requirements for toxic pollutants in the first place, it seems most unlikely that Congress intended to restrict EPA's customary rulemaking authority in this way.

Thus, respondent's definition of the term "modify" fails to eliminate the conflict between Sections 301(f) and 307(b)(2), since the periodic revisions required by the latter provision may well result in the relaxation of requirements shown by subsequent research or experience to have been unreasonably stringent. Needless to say, when two statutory provisions are facially conflicting, it can hardly be argued that the statutory language is plain and that extrinsic aids to construction may not be consulted.

Furthermore, respondent points to nothing in the language of Section 301(f) that shows which of the two contended meanings of the term "modify" Congress intended to adopt. Losing sight of the fact that it is attempting to advance a "plain meaning" argument, respondent finds it necessary to rely on other provisions of the Act (Br. 17, 19) and even the legislative history (Br. 16) to show what Section 301(f) means. Obviously this is no "plain meaning" argument at all.<sup>7</sup>

<sup>7</sup> It is also interesting to note that respondent's definition does not support the court of appeals' holding that EPA may not issue any FDF variances for toxic pollutants. An FDF variance can result in a requirement that is more stringent than the national standard, if the facility's fundamentally different factors so warrant. 40 C.F.R. 401.15(b) (Fed. App. A112). Respondent calls this argument "disingenuous" (Br. 14 n.19) because no applicant has requested more stringent requirements. The point is, however, that respondent and any other interested person could initiate the FDF variance process to seek a more stringent requirement. That respondent has never seen fit to invoke the regulation for this purpose proves nothing.

Respondent appears to shrink from the unavoidable implications of its own construction of Section 301(l). It is noteworthy that respondent refrains from arguing that Section 301(l) prohibits the amendment of categorical limitations or standards for toxic pollutants. Instead, respondent states (Br. 17; emphasis added) that Section 301(l) means that EPA "cannot . . . make these national standards less stringent for individual plants, at least where toxics are concerned." Where in the plain language of Section 301(l) does respondent discern this distinction between modifications that affect a broad category of plants and those that affect only a smaller class?<sup>9</sup>

### III.

A. Because the statutory language does not answer the question presented by this case, we turn to the legislative history. The relevant legislative history is sparse, but it clearly provides far more support for EPA's interpretation of Section 301(l) than for respondent's. There are three relevant aspects of the legislative history: (1) the evolution of Section 301(l), (2) what Congress said about this provision, and (3) the inference that may be drawn from what Congress did not say in light of the then existing state of the law and EPA's established practices.

1. The origin and evolution of Section 301(l) are set out in Chemical Manufacturers Association's (CMA's) opening brief (at 29-30). In short, what is now Section

<sup>9</sup> Furthermore, respondent's argument that EPA may not make any plant-specific modifications, cannot be squared with respondent's own recognition that EPA may establish subcategories of one or a few plants. Resp. Br. 41 & n.40; Transcript of Oral Argument in court of appeals 252. EPA thus has the authority to promulgate national pretreatment standards in the first instance for a subcategory of one plant, and it has commensurate authority under Section 307(b)(2) to "revise" a national pretreatment standard for such a subcategory.

301(l) was first proposed in 1977 as a provision of Section 301(c) that prohibited the granting of Section 301(c) modifications for toxic pollutants. When Congress decided to add Section 301(g), which authorizes the granting of water quality modifications, a virtually identical provision banning such modifications for toxic pollutants was included in that section. The Conference Committee deleted the prohibitions in Section 301(c) and (g) and consolidated them into a single provision, Section 301(l). The Conference Committee did not explain the reason for this amendment, but Representative Roberts, the House floor manager stated:

Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *Legislative History of the Clean Water Act of 1977*, 328-329 (Comm. Print 1978) (emphasis added) [hereinafter *Leg. Hist.*].

Putting aside for the moment what Representative Roberts said, we think that the evolution of Section 301(l) supports EPA's interpretation of that provision rather than respondent's. In our view, the prohibitions originally included in Section 301(c) and (g) were consolidated into a separate Section 301(l) for stylistic purposes.<sup>10</sup> For this reason, the Conference Committee had no cause to explain the change.

<sup>10</sup> When the Conference Committee created Section 301(l) by consolidating the prohibitions previously included in Section 301(c) and (g), the Committee added a clause to Section 301(g) prohibiting water quality modifications for conventional pollutants and thermal discharges, as well as for toxic pollutants. See CMA Br. 30 n.28. Because this clause is broader than Section 301(l), which



Respondent argues (Br. 19), however, that the conferees created Section 301(f) because they wanted to make a substantive change not contained in the bill passed by either House. According to respondent, Section 301(f) was created to prohibit other modifications in addition to those available under Section 301(c) and (g). But if the conferees intended to make such a substantive change, one would expect them to have provided notice to their colleagues and some explanation of their action. None, however, was provided.

There is another glaring defect in respondent's interpretation of the drafting process. If the Conference Committee intended for Section 301(f) to apply to modifications in addition to those available under Section 301(c) and (g), the Committee must have had some other type or types of modifications specifically in mind. But according to respondent (Br. 21), "Congress did not believe other variances [*i.e.*, other than Section 301(c) and (g) modifications] were authorized."<sup>20</sup> What, then, does respondent think the conferees sought to accomplish?

We of course submit that Congress was well aware of EPA's practice of granting FDF variances, especially since that practice had been prominently discussed and approved in *deFacto*. And as previously noted, if the conferees had intended to restrict the issuance of such variances, some reference to FDF variances would most likely have been made. None was.

2. EPA's interpretation is also supported by Congress's discussion of Section 301(f). Like the remarks of Representative Roberts previously noted, the legisla-

<sup>20</sup> Respondent elaborates that at the time of the 1977 amendments, Congress did not "focus" on BPT limitations (Br. 27) and had no way of anticipating that EPA would issue FDF variances for pretreatment and BAT standards (Br. 24-26).

tive history cited by respondent only confirms the accuracy of EPA's interpretation. For example, the quoted statement of Senator Muskie—that "there are no potential waivers or modifications" (Resp. Br. 21)—was made specifically in the context of discussing Section 301(c) and (g). *Leg. Hist.* 458. Similarly, the Senate Report excerpt quoted by respondent (Br. 21), which states that "the [Senate] bill prohibits variances for [toxic] pollutants," comes specifically in a discussion of the Senate version of what became Section 301(g). See *Leg. Hist.* 673-677 (discussing water-quality based modifications).

The only other portions of the legislative history claimed by respondent to support its position are references to Section 301(c) and (g) as "variance" provisions (see Br. 16 & n.21). Contrary to respondent's suggestion (Br. 16-17), we do not dispute the authoritativeness of these pronouncements. What we contest is their bearing on the issue in this case. Although not spelled out, respondent's argument is based on the following chain of reasoning:

1. Section 301(f) prohibits "modif[ications]" for toxic pollutants.
2. Section 301(c) and (g), which authorize "modif[ications]," were described by Congress as "variance" provisions.
3. An FDF variance is obviously a "variance."
4. Therefore, Section 301(f) prohibits FDF variances.

It is not necessary to be a logician to see what is wrong with this reasoning. If A includes B, and B resembles C, it does not follow that A also includes C. Here, just because a Section 301(c) or (g) modification may be described as a variance, it does not follow that an altogether different sort of variance (*i.e.*, an FDF variance) is a "modification" in the legal sense intended



by Section 301(f). The fallacious reasoning used by respondent can be employed to "prove" any number of untruths—for example, that EPA is required by Section 307(b)(2) to issue Section 301(c) and (g) modifications and FDF variances on a periodic basis:

1. Section 307(b)(2) requires EPA to "revise" its requirements as developments warrant.
2. A revision may be described as a "correction" or "alteration." Webster's Third New International Dictionary 1944 (1976 ed.) Random House Dictionary of the English Language 1227 (unabr. ed. 1967).
3. Section 301(c) and (g) modifications and FDF "variances" may be described as "corrections" or "alterations."
4. Therefore, Section 307(b)(2) requires EPA periodically to issue Section 301(c) and (g) modifications and FDF variances."

3. The remaining question with respect to the legislative history is what may be inferred from the undisputed fact that Congress never mentioned FDF variances during its consideration of Section 301(f). We think that Congress must have been aware of and understood EPA's practice of granting FDF variances and

"The present Congress did not reject the concept of FDF variances for toxic pollutants, as respondent suggests (Br. 26 n.27). The Senate bill amending the Clean Water Act was reported out of committee on the day after the court of appeals' decision (see Resp. Br. 26 n.27) and thus naturally did not contain a provision to overrule that decision. In the House, EPA did advert to the need to overrule that decision, but no bill to that effect was proposed. This history does not show that the present Congress endorsed the court of appeals' decision. And in any event, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 402 U.S. 116, 135 n.27 (1963), quoting *United States v. Price*, 385 U.S. 394, 395 (1966).

that Congress's failure to mention those variances in connection with Section 301(f) suggests that Congress did not intend to affect that practice.

Respondent contends (Br. 21) that Congress had no reason to mention FDF variances as among those modifications to be prohibited by Section 301(f) because "Congress did not believe other variances [besides section 301(c) and (g) modifications] were authorized, 1972 Leg. Hist. 172, 309, and EPA had not yet promulgated an FDF variance for either pretreatment or BAT standards." Respondent's reliance on 1972 legislative history is clearly misplaced. It is Congress's intent in 1977, not 1972, that is at issue here. By the time Congress took up the 1977 amendments to the Act, EPA had regularly promulgated FDF variances as part of national BPT effluent limitations. Moreover, those FDF variances were always made available for pollutants that Congress designated as toxic in 1977. And variances for such pollutants had been granted.<sup>10</sup> That EPA had not yet incorporated the FDF variances into BAT effluent limitations or pretreatment standards is beside the point,<sup>11</sup> because the issue is whether Section 301(f) bars FDF variances for all requirements of Section 301.

<sup>10</sup> See EPA Br. 26.

<sup>11</sup> During the first five years after initial passage of the 1972 Act, EPA's main objective was to issue the first tier of national technology-based regulations, which established BPT requirements for categories of dischargers. These regulations covered discharges of both toxic and non-toxic pollutants, and FDF variances were available regardless of the type of pollutant. Prior to 1972, the FDF variance was not yet included in BAT regulations or pretreatment standards because the Agency had not yet turned its full efforts and refined its approach to those requirements. When it did so after enactment of the 1977 amendments, it recognized that FDF variances were equally appropriate for those regulations. The fact that the Agency's thinking evolved only confirms that the Administrator has broad leeway to construe the statute. *Cherion*, slip op. 28.

Congress also must have been aware of this Court's opinion in *daCosta*, which discussed and approved EPA's practice of granting FDF variances. Respondent suggests (Br. 26-27) that Congress was not familiar with the discussion in *daCosta*, but in respondent's own words, *daCosta* was a "pivotal" case in the history of the Clean Water Act. It had just been decided. And the discussion of FDF variances was closely related to the Court's holding. We doubt that this discussion could have escaped the attention of a Congress that was then in the process of amending the Act.

Respondent argues that *daCosta* approved FDF variances only with respect to BPT limits. For reasons already discussed (see Gov't Br. 20-23; pages 1-3, *supra*), we disagree. But in any event, since Section 301(i) applies to BPT limitations, as well as all other requirements of Section 301, respondent's argument is beside the point.

Respondent contends, however, that Congress did not "focus[]" on BPT limitations when it enacted Section 301(i) (Br. 27). But Section 301(i) indisputably applies to BPT limitations; and in 1977, those limitations were scheduled to remain in effect for the next seven years. Respondent is accusing Congress of a major and implausible oversight.

In sum, we think that Congress was aware of EPA's practice of granting FDF variances and that if Congress had intended to restrict that practice it would have said so. Congressional intent to overturn established law should not be inferred in the absence of an express indication.<sup>10</sup> *Edwards v. Congolex Chemical Transportation*, 643 U.S. 214, 216-217 (1979).<sup>11</sup>

<sup>10</sup> The pre-existing law in *Edwards* does not appear to have been as well-settled as respondent would like to believe. See *Edwards*, 643 U.S. at 216 (Blackmun, J., dissenting).

<sup>11</sup> *Zuber v. Ullrich*, 396 U.S. 385 (1969), relied on by respondent (Br. 28), supports EPA. There, the Court held that the Secretary of Agriculture had exceeded his authority in issuing

## IV.

The remainder of respondent's brief (at 30-43) is devoted to arguing that EPA's practice of granting FDF variances is not sound policy and that EPA's objectives can be better achieved by alternative means. We disagree with respondent's analysis. But, in any event, the issue in this case is not whether, in the Court's view, EPA has adopted the best practice. *Chevron*, slip op. 26-28. Rather, the issue is whether EPA's interpretation of the Act is permissible, and on that question respondent's argument falls far short. Despite its rhetoric, respondent's disagreement with the Agency is really quite narrow. There is no dispute that in setting pretreatment standards and other requirements of Section

milk pricing orders that included an adjustment based on a milk producer's location. The Court concluded (396 U.S. at 180-181) that such location differentials were fundamentally inconsistent with the statute's "plain thrust" and conflicted with Congress's intent as expressed in the legislative history. In that context, the Court concluded that "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route" (*id.* at 185) and that Congress's failure in ensuing years to reverse the Secretary's practice could not be construed as an endorsement (*id.* at 185-186 n.21).

Our position in this case is fully consistent with *Zuber*. The FDF variance does not conflict with either the "plain thrust" of the Clean Water Act or with the legislative history. More fundamentally, however, in *Zuber*, as well as in *TVA v. Hill*, 437 U.S. 153 (1978), on which respondent also relies (Br. 9, 23, 26), this Court refused to infer congressional approval of a particular agency practice in the absence of an express indication of such an intent. But here, respondent asks the Court to infer the opposite—a congressional intent to disapprove a longstanding agency practice, in the absence of any specific disapproval of that practice, and even though the statutory language is not clear on its face. Even if Congress did not specifically embrace the FDF variance, there is certainly no evidence that Congress sought to invalidate that variance as to toxic pollutants. Particularly where, as here, the pre-existing administrative practice is not at odds with the underlying structure and purpose of the Act, such an intent on the part of Congress should not be inferred.

301 EPA is justified in making special allowance for those facilities that face factors fundamentally different from other facilities in the industry. EPA has chosen to deal with this problem by attempting to issue categorical requirements as quickly as possible, while permitting atypical facilities to seek FDF variances at a later date. Respondent, on the other hand, while contesting the issuance of FDF variances, does not dispute EPA's authority to create special subcategories for an atypical plant or plants. On the contrary, respondent observes (Br. 41; emphasis added) with apparent approval that "requests to establish separate subcategories for one or a few plants which are somehow 'different' from others in the same category are a common feature of [EPA] rulemakings." Nor does respondent dispute EPA's authority to amend its rules after issuance to create such subcategories. In other words, respondent disagrees, not with the substance of what EPA is doing, but with the procedure. But if deference to an administrative agency's expertise and construction of the statute it administers means anything, it must mean that the agency is permitted to make such procedural choices absent a clear expression of contrary congressional intent. Particularly in view of the small number of FDF variances that are sought and granted, there was no justification for the court of appeals' interference with the procedure chosen by the Agency to achieve a concededly valid end.

Arguing that the FDF variance procedure conflicts with Congress's broad intent in enacting the 1977 amendments, respondent emphasizes that the 1977 amendments reflect a congressional intent to achieve control of toxic pollutants through national categorical regulations that are "as uniform as possible" (Br. 22, 23, 32-33 (emphasis added)). The FDF variance, however, is utterly consistent with this goal, because Congress recognized that EPA must be allowed to take into account the diversity within each industry by establishing appro-

priate subcategories (*Leg. Hist.* 455). The categorical approach to setting standards necessarily means that some individual plants within a category must incur costs greater than other plants in that category (See *Rec.p.* Br. 34). But the point of the FDF variance is to allow a recategorization of those plants that must incur costs wholly disproportionate to the range of costs considered by EPA during the rulemaking for that category.<sup>16</sup> Moreover, the FDF variance mechanism does not give EPA "carte blanche" to establish case-by-case requirements "without limit" (*Resp.* Br. 32). FDF variances may be granted only under very narrowly circumscribed conditions—conditions that would have warranted creation of a separate subcategory in the first place. And contrary to respondent's contention (Br. 32), an FDF variance application is not considered in isolation from the larger category or subcategory in which the plant was originally classified. Instead, the Agency compares the plant in question to the category as a whole to determine if the plant's factors are "fundamentally different" from those considered by the Agency.<sup>17</sup>

<sup>16</sup> For example, if during the rulemaking EPA finds that the maximum cost to be incurred by a plant in a subcategory is \$1 million, then any plant in that category clearly can be required to incur such costs even if other plants may need to spend much less to comply. But a plant that must spend \$5 million to meet the requirement because it is fundamentally different from those considered by the Agency in establishing the rule may be entitled to argue that it should be treated as a separate subcategory.

<sup>17</sup> Nor has EPA improperly incorporated BPT criteria into variance decisions regarding BAT, as respondent claims (Br. 34-35). The Act clearly requires the Agency to consider costs in establishing BAT effluent limitations (33 U.S.C. 1314(b)(2)(B)) and thus an individual plant's costs—as opposed to its ability to afford those costs—is also an appropriate factor in determining whether to grant an FDF variance. In any event, the issue in this case is not the content of any specific variance, but EPA's authority to promulgate any FDF variance for pretreatment standards. See *duPont*, 430 U.S. at 128 n.19.



Respondent also contends that the procedures for granting FDF variances differ from those followed when subcategories are created during initial rulemaking or subsequent revisions. The latter procedures are clearly more to respondent's liking. Resp. Br. 36-37. But the issue in this case is the meaning of Section 301(l), and there is no basis for contending that the purpose of that provision was to regulate the procedures by which EPA can accomplish the same permissible end. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

Respondent, echoing the court of appeals, claims that it "makes no sense" to conclude that Congress intended to prohibit Section 301(c) modifications but not to prohibit FDF variances. Resp. Br. 31-32. The fact is, however, that Section 301(c) modifications and FDF variances do not serve the same function. A Section 301(c) modification is available to a facility able to show that the national categorical standard would cause it severe economic hardship and that the facility meets the other statutory prerequisites. A Section 301(c) modification may be granted even though EPA took into account all of the appropriate factors in establishing the national standard. The FDF variance, by contrast, rectifies EPA's oversight or omission in establishing the national rule and has nothing to do with a plant's ability to afford compliance. If Section 301(c) modifications and FDF variances were indistinguishable, it would have been pointless for this Court to approve FDF variances for BPT requirements in *duPont*, yet disallow modifications to BPT requirements based on Section 301(c) factors in *National Crushed Stone*.<sup>18</sup> Therefore, simply be-

<sup>18</sup> Contrary to the interpretation of both respondent (Resp. Br. 31) and the court of appeals (Fed. App. 48E), this Court did not conclude in *National Crushed Stone Ass'n* that Section 301(c) modifications and FDF variances "serve the same function." See Gov't Br. 33 n.25.

cause Section 301(l) prohibits Section 301(c) modifications for toxic pollutants, it does not follow that FDF variances are also prohibited. See Gov't Br. 30-33.

Finally, the FDF variance mechanism does not thwart Congress's desire that national technology-based controls for categories of industries be established as expeditiously as possible. On balance, the FDF variance mechanism advances that goal by helping the Agency to establish sound national categorical regulations that are less subject to attack on the ground that an atypical plant or plants were not adequately considered. Respondent has the luxury of calling the FDF variance "nothing more than a fig leaf for inadequate agency rulemaking" (Br. 38), because it is EPA, not respondent, that is faced with the difficult task of implementing and construing the Clean Water Act. Respondent's bald assertion that the FDF variance makes national rules more vulnerable to challenge (Br. 38) is difficult to understand. The FDF variance has in fact helped to protect against precisely this risk (see, e.g., *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979)), and respondent cannot cite one case arising under the Clean Water Act to support its contrary contention. The FDF variance does not put all of EPA's "eggs in [one] basket" (Br. 38); the FDF variance mechanism constitutes an infrequently used but nevertheless important safeguard that courts have relied on in rejecting challenges to national rules. The Agency has promulgated categorical regulations covering tens of thousands of industrial dischargers, and the fact that a handful of individual plants make use of the FDF variance process does not constitute a threat to the goals of the Act.<sup>19</sup> EPA's interpretation of the Act it adminis-

<sup>19</sup> Respondent cites (Br. 43) an excerpt from the Conference Report reflecting congressional concern that steam electric power plants had been abusing a provision found in an entirely separate section of the Act, § 316, 33 U.S.C. 1326, with respect to the discharge of heat. This is utterly irrelevant to the proper construction of Section 301(l), which does not even apply to Section 316.



ters is a "permissible" one (*Chevron*, slip op. 5) and should be sustained.

For the foregoing reasons and those set forth in our opening brief, the opinion of the court of appeals should be reversed.

Respectfully submitted,

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